Could Changes to the Endangered Species Act Actually Threaten Species?

Manuel L. Colon Jr.

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COULD CHANGES TO THE ENDANGERED SPECIES ACT ACTUALLY THREATEN SPECIES?

I. UNITED STATES CONSERVATION LEGISLATION: AN INTRODUCTION TO THE ENDANGERED SPECIES ACT

The United States federal government has enacted legislation concerning wildlife conservation since the early 1900s.1 Prior to the enactment of the Endangered Species Act of 1973 (ESA), Congress passed acts — such as the Migratory Bird Treaty Act of 1918, the Endangered Species Preservation Act of 1966, and the Endangered Species Conservation Act of 1969 — to protect threatened species.2 In addition, eighty nations met and signed the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1973.3 Following the CITES treaty, Congress passed the ESA, which President Richard Nixon signed into law.4


The ESA replaced all prior federal conservation protection acts and increased safeguards for plant and animal species identified as threatened or endangered. Since its enactment, the ESA has been the primary tool in protecting threatened and endangered species - all of which occupy important ecological niches - including: the humpback whale, the Tennessee purple coneflower, and the Florida manatee. In 2018, President Trump’s administration announced changes to the enforcement of the ESA, which scientists have criticized for potentially jeopardizing protection of at-risk species.

This Comment explores the Trump administration’s proposed changes to enforcement of Sections Four and Seven of the ESA. Part II will provide a regulatory overview of the ESA and caselaw discussing the interpretation of the impacted sections. A discussion of various opinions regarding the revisions and reasons for supporting or opposing the revised interpretations of the ESA is found in Part III. Part IV will conclude by examining the potential effects of the Trump administration’s changes to the enforcement of the ESA.


8. For a discussion of the proposed changes the Trump administration has carried out, see infra notes 76-128 and accompanying text.

9. For a discussion of statutory changes to the ESA, see infra notes 12-128 and accompanying text.

10. For a discussion of various perspectives with respect to the changes and their effects, see infra notes 129-171 and accompanying text.
tial environmental impacts and consequences of this regulatory change.¹¹

II. BACKGROUND

A. Brief Introduction and History of the ESA

The nation’s first comprehensive endangered species legislation was the Endangered Species Preservation Act of 1966.¹² This act authorized the Secretary of the Interior to determine whether certain fish or wildlife species were endangered.¹³ Additionally, the Act permitted the Secretary of the Interior to possess land inhabited by endangered species, in order to be part of the National Wildlife Refuge System.¹⁴ Congress later amended the Endangered Species Preservation Act and renamed it to the Endangered Species Conservation Act of 1969.¹⁵ This amendment increased the scope of its predecessor by broadly protecting animals “threatened with worldwide extinction.”¹⁶ Congress later enacted the ESA as a means to meet the congressional purposes of the Act’s preceding statutes - the Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969.¹⁷

Shortly thereafter, in the 1970s, America was in a period of great environmental awareness and activism.¹⁸ National environmental milestones in this decade include: the passage of the National Environmental Policy Act, which created the Council on Environmental Quality; the first nationwide Earth Day celebration; the formation of the National Oceanic and Atmospheric Administration; the passage of the Federal Water Pollution Control Act; and

¹¹ For a discussion of potential environmental consequences of the statutory changes, see infra notes 172-185 and accompanying text.
¹³ Id. (detailing more information about 1966 conservation act).
¹⁴ Id. (indicating change to Endangered Species Preservation Act of 1966).
¹⁵ Id. (stating change to protection under newly amended act).
¹⁶ See DiSabatino, supra note 12 (justifying necessity of ESA).
Congressional approval of the ESA. Many of these acts arose from growing public demand for political leadership to address environmental concerns. Congress found the existence of various species critical to the survival of ecosystems and, therefore, certain species required statutory protection against extinction. Despite financing concerns, President Nixon signed the ESA into law.

The ESA defines an “endangered species” as “any species . . . in danger of extinction throughout all or a significant portion of its range” and a “threatened species” as “any species which is likely to become endangered within the foreseeable future . . . .” The ESA has three purposes: (1) to conserve the ecosystems of endangered and threatened species; (2) to provide conservation programming for those species; and (3) to take the steps in furtherance of the Act’s purpose and findings. The United States Fish and Wildlife Services (FWS) — from the Department of Interior — and National Marine Fisheries Service (NMFS) — from the Department of Commerce — share enforcement authority under the Act.

B. Legal Interpretation of Sections Affected by the Proposed Rule

The Supreme Court has ruled on cases that have interpreted the provisions of the Act which the Proposed Rule sought to amend. These cases provide prior judicial interpretation and explanation of: “foreseeable future,” “delisting species,” “critical

19. Id. (describing timeline of environmental actions in 1970s).
22. Rinde, supra note 20 (explaining historical context of President Nixon signing ESA).
23. § 1532(6), (20) (defining terms used in ESA).
24. Id. at § 1531(b) (declaring ESA’s purpose).
26. For a discussion of the case law relevant to the rulemaking process, see infra notes 29-75 and accompanying text.
habitat,” and “unoccupied areas.” These interpretations are critical for the rule’s enforcement and impact on the environment.

1. Foreseeable Future

During the recent interpretation revision process, the FWS and the NMFS relied on case law to support enforcement changes. For example, Safari Club International v. Salazar focuses on the FWS’s decision to classify the polar bear as an endangered species. The Secretary of the Interior proposed a rule to add the polar bear to the list of threatened species following the Center for Biological Diversity’s petition for action. The agency contended scientific data and reports justified listing the polar bear as an endangered species. Furthermore, the agency determined the scientific findings satisfied two factors necessary for listing a species: (1) the species’s habitat was in danger; and (2) the lack of regulatory safeguards in place to preserve the species. The United States District Court for the District of Columbia granted summary judgment to the FWS; appellants challenged the recent revisions to the agency’s application of “likely” and definition of “foreseeable future.”

Ultimately, the United States Court of Appeals for the District of Columbia Circuit affirmed the lower court’s holding with respect to the agency’s proposed listing rule. The appellate court’s opinion addressed all of the appellant’s claims in detail. The appellate court found the agency correctly interpreted the term “likely,” but deemed its definition of “foreseeable future” unreasonable. The court adopted the agency’s reasoning that the ordinary meaning of

27. See generally Proposed Rule, supra note 25 (detailing each section’s changes).
28. For a discussion of the impact of this rule, see infra notes 172–185 and accompanying text.
29. See generally Proposed Rule, supra note 25 (mentioning case law agencies relied on to justify interpretation changes).
30. 709 F.3d 1 (D.C. Cir. 2013) (discussing FWS’s interpretation of “foreseeable future”).
31. Id. at 2 (discussing agency action regarding status of polar bear).
32. Id. (stating FWS’s reason for listing polar bear as endangered).
33. Id. at 5-6 (stating agency’s finding regarding status of polar bear).
34. Id. at 6 (finding statutory support for decision).
35. Safari Club Int’l, 709 F.3d at 7-8 (listing claims on appeal).
36. Id. at 19 (upholding FWS’s decision to list polar bear as threatened species).
37. See generally id. at 8-19 (reviewing all claims on appeal).
38. Id. at 14-16 (stating court’s finding with respect to interpretation and application of terms in ESA).
“likely” is appropriate because “likely” is defined in the ESA.\textsuperscript{39} The court also accepted the agency’s foreseeable future determination based on a case-by-case basis.\textsuperscript{40}

2. Delisting Species

In \textit{Friends of Blackwater v. Salazar},\textsuperscript{41} plaintiff (Blackwater), a nonprofit organization, sued the FWS for its decision to delist the West Virginia Northern Flying Squirrel (squirrel).\textsuperscript{42} Blackwater claimed that FWS’s removal of the squirrel from the endangered species list violated the ESA.\textsuperscript{43} The conservation group argued that the agency’s determination must meet specific objectives measured by the species’s Recovery Plan.\textsuperscript{44} The United States District Court for the District of Columbia granted summary judgment to Blackwater, but on appeal the appellate court sided with the FWS and contended the Recovery Plan was not binding on the agency’s decision to withdraw the squirrel’s endangered status.\textsuperscript{45}

In 1985, the FWS created this Recovery Plan for the squirrel after determining the species was endangered due to its declining population.\textsuperscript{46} Complying with Section Four of the ESA, the FWS created a recovery plan and listed four criteria that, when met, would result in the delisting of the squirrel.\textsuperscript{47} The FWS employed a

\begin{itemize}
  \item \textit{Id.} at 14-15 (suggesting court’s agreement with agency’s definition of “likely”).
  \item \textit{Safari Club Int’l}, 709 F.3d at 15-16 (signalng court’s approval for case-by-case basis determination with foreseeable future analysis).
  \item 691 F.3d 428 (D.C. Cir. 2012) (challenging FWS’s decision to remove squirrel from endangered species list).
  \item See id. at 432 (stating claims against FWS). Friends of Blackwater is a citizens support group that supports Blackwater National Wildlife Refuge and the Chesapeake Marshlands National Wildlife Refuge Complex with various conservation efforts and programs. See also About the Friends of Blackwater, FRIENDS OF BLACKWATER NAT’L WILDLIFE REFUGE, https://www.friendsofblackwater.org/about.html (last visited Jan. 23, 2020) (providing background information on Blackwater’s conservation activity).
  \item \textit{Id.} at 432 (citing one claim against FWS).
  \item Id. (citing Blackwater’s position at trial). Recovery Plans are species specific to monitor the recovery process. Recovery — Overview, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/endangered/what-we-do/recovery-overview.html (last visited May 17, 2020) (providing brief summary of Recovery under ESA). In general, a species’s Recovery Plan provides metrics determining a particular species’s ability to recover from being endangered. See id. (discussing Recovery Plan’s purpose and use for endangered species).
  \item Friends of Blackwater, 691 F.3d at 432 (stating FWS’s position with respect to Blackwater’s first claim).
  \item Id. at 430 (describing circumstance for listing squirrel as endangered).
  \item Id. at 430-31 (listing criteria for removal). The criteria for removal included:
\end{itemize}
biologist to study the squirrel and ultimately determine its status.\textsuperscript{48} A 2006 report showed that the squirrel’s population increased from ten, its 1985 total, to 1,063.\textsuperscript{49} As a result, the agency proposed the squirrel’s removal from the list because the data showed it was no longer endangered as defined by Section 4(a)(1), rather, it was “robust.”\textsuperscript{50} The D.C. Circuit reversed the lower court’s ruling that the FWS violated the ESA since the recovery plan was not binding on the agency’s decision to delist a species.\textsuperscript{51} The appellate court found that, based on the language of the statute, either parties’ interpretation of the statute could be valid.\textsuperscript{52} The court, however, accepted the agency’s interpretation.\textsuperscript{53}

3. Critical Habitat

The FWS and the NMFS cited \textit{Natural Resources Defense Council v. United States Department of Interior}\textsuperscript{54} as another supporting authority for their proposed revision to “critical habitat.”\textsuperscript{55} The issue in \textit{Natural Resources Defense Council} was whether the Department of the Interior violated the ESA when it failed to designate critical habitat for the California gnatcatcher.\textsuperscript{56} The California gnatcatcher, a

\begin{enumerate}
\item [\textsuperscript{48}] squirrel populations are stable or expanding . . . in a minimum of 80\% of all Geographic Recovery Areas [GRAs] designated for the subspecies,
\item [\textsuperscript{49}] sufficient ecological data and timber management data have been accumulated to assure future protection and management . . .
\item [\textsuperscript{3}] GRAs are managed in perpetuity to ensure: (a) sufficient habitat . . . and (b) habitat corridors . . . [and]
\item [\textsuperscript{4}] existence of the high elevation forests on which the squirrels depend is not itself threatened by introduced pests . . . or by environmental pollutants . . . .
\end{enumerate}

\textit{Id.} at 431 (detailing criteria for removal).

\textsuperscript{48} \textit{Friends of Blackwater}, 691 F.3d at 431 (illustrating agency’s action toward determining species’s status seventeen years after being classified as endangered).

\textsuperscript{49} \textit{Id.} (noting species’s population increase). At the time, the Secretary of Interior interpreted this finding to mean the squirrel’s population was “robust.” \textit{Id.} (providing Secretary of Interior’s opinion regarding squirrel’s status following independent report).

\textsuperscript{50} \textit{Id.} (seeking to remove species from endangered list).

\textsuperscript{51} \textit{Id.} at 429 (discussing procedural posture of case).

\textsuperscript{52} \textit{Id.} at 433 (mentioning different ways for interpretation).

\textsuperscript{53} \textit{Friends of Blackwater}, 691 F.3d at 436 (finding in favor of agency).

\textsuperscript{54} 113 F.3d 1121 (9th Cir. 1997) (challenging failure to designate critical habitat for coastal Carolina gnatcatcher).

\textsuperscript{55} See Proposed Rule, supra note 25 (citing case law in agencies’ justification for revision).

songbird native to parts of northern and southern California, was listed as a threatened species within the meaning of the ESA on March 30, 1993.\textsuperscript{57} Section Four of the ESA requires the FWS to create a critical habitat for at-risk species.\textsuperscript{58} The gnatcatcher’s survival depended on coastal sage scrub, and the FWS concluded that coastal sage scrub loss posed a threat to the species’s continued existence.\textsuperscript{59} The FWS concluded that a critical habitat determination would not meet the Section Four meaning of “prudent.”\textsuperscript{60} The agency explained that designating coastal sage scrub as a critical habitat for the California gnatcatcher would, in fact, increase the threat to the species.\textsuperscript{61} The court, however, found that the agency violated Section Four because it failed to further analyze the species’s status regardless of its critical habitat designation.\textsuperscript{62}

Additionally, the FWS found that this designation would not benefit the gnatcatcher because most of the species’s population was on private lands, which were not within the scope of Section Seven of the ESA.\textsuperscript{63} Ultimately, the United States Court of Appeals for the Ninth Circuit reversed the lower court’s grant of summary judgment to the Agency.\textsuperscript{64} The Ninth Circuit remanded the case, concluding the FWS’s actions were an abuse of discretion.\textsuperscript{65}

4. Unoccupied Areas

In \textit{Otay Mesa Property L.P. v. United States Department of Interior},\textsuperscript{66} property owners sued the FWS, claiming the Agency failed to cancel its designation of their property as a critical habitat for the San Diego Fairy Shrimp under the ESA.\textsuperscript{67} Applying administrative law

\textsuperscript{57} Id. (citing status of California gnatcatcher under ESA).
\textsuperscript{58} Id. (discussing procedural process when listing species in relation to critical habitat). Section 7, which works with Section 4 of the ESA, requires that the FWS or NMFS consult with the Secretary of the Interior to make sure federal actions that are authorized, or being funded, do not adversely affect the species’s critical habitat. Id. (illustrating Section 7 and Section 4’s interplay).
\textsuperscript{59} Id. (discussing habitat needed for California gnatcatchers).
\textsuperscript{60} Id. (discussing justification for FWS’s conclusion regarding critical habitat determination for California gnatcatcher).
\textsuperscript{61} Nat. Res. Def. Council, 113 F.3d at 1125 (providing first reason for declining critical habitat determination).
\textsuperscript{62} Id. (finding against FWS with respect to critical habitat determination).
\textsuperscript{63} Id. at 1125-26 (stating second reason for conclusion).
\textsuperscript{64} Id. at 1127 (providing Ninth Circuit’s holding).
\textsuperscript{65} Id. (providing procedural directions for lower court on remand).
\textsuperscript{66} 714 F. Supp. 2d 73, 75 (D.D.C. 2010) (bringing claim against FWS for failure to cancel designation), rev’d on other grounds, 646 F.3d 914 (D.C. Cir. 2011).
\textsuperscript{67} Id. at 75 (discussing reason for bringing claim). On appeal, both parties filed motions for summary judgment. Id. (explaining procedural posture for appellate court).
principles to the parties’ cross summary judgment motions, the district court granted the FWS’s motion.68 The court, however, found the Agency’s designation to be “thin” after analyzing the evidence of fairy shrimp’s occupation of the land.69 The property owners argued against the Agency’s critical habitat designation, claiming it lacked sufficient proof.70 The court concluded the FWS’s designation should have occurred the moment the Agency classified the fairy shrimp as “endangered.”71

Although the FWS failed to designate the habitat earlier, the court held the Agency’s assumption at the time of the species’s status determination could lead to a reasonable inference that the habitat was critical.72 Ultimately, the court ruled that the FWS properly designated the plaintiffs’s property as part of the fairy shrimp’s critical habitat.73 The FWS claimed two fairy shrimp sightings, one in 1997 and one at the time of litigation, were sufficient to establish occupation.74 The FWS concluded that the disputed property contained “[e]lements [n]ecessary to the [r]ecovery or [s]urvival of . . . [the] [f]airy [s]hrimp,” and thus met the statutory requirements for critical habitat designation.75

C. Proposed Rule

On July 25, 2018, the Trump Administration, through the FWS and NMFS, published a Proposed Rule seeking to modify the ESA regulation.76

The Proposed Rule represents the agencies’s attempt to “clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and

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68. Id. (granting summary judgment to defendant).
69. Id. (explaining Agency assumed occupation because species’s habitat was designated years after its endangered classification).
70. Id. (noting plaintiffs’s argument).
71. See Otay Mesa Prop. L.P., 714 F. Supp. 2d at 75 (explaining relation between endangered status and critical habitat designation). The court reminded the FWS of its obligation to designate the fairy shrimp’s habitat as critical when it classified the species as endangered. Id. (describing FWS’s error).
72. Id. (providing court’s analysis).
73. Id. at 82 (concluding FWS did not violate ESA).
74. Id. (providing FWS determined species occupation based on two sightings and nature of property).
75. Id. at 83 (explaining plaintiffs’s land is critical for fairy shrimp conservation).
76. See generally Proposed Rule, supra note 25 (indicating FWS’s and NMFS’s intent to amend ESA).
designating critical habitat.”77 Specifically, the Proposed Rule asserted the agencies’ desired change to enforcement of Section Four of the Act.78 Section Four provides factors for determining a species’s designation as endangered or threatened, reclassified, or removed.79 The following are utilized to assess species endangerment:

1. The present or threatened destruction, modification, or curtailment of its habitat or range;
2. [o]verutilization for commercial, recreational, scientific, or educational purposes;
3. [d]isease or predation;
4. [t]he inadequacy of existing regulatory mechanisms; or
5. [o]ther natural or manmade factors affecting its continued existence.80

1. Economic Impact Consideration

One revision to Section Four affects the parameters by which each agency’s secretary evaluates a species’s status.81 The secretaries expressed the need to remove the phrase “without reference to possible economic or other impacts of such determination[ . . . ]”82 The Proposed Rule cited congressional intent to justify the modification because a prior amendment permitted “solely . . . the best scientific and commercial data” to be used for classifying species.83 The agencies asserted that removal of this phrase would not change the standard by which they determine species’ statuses.84

77. Id. (stating purpose for revising ESA). Regulatory agencies also sought to amend other sections for technical reasons. Id. (expressing FWS’s and NMFS’s other proposed changes).
78. Id. (emphasizing section of ESA to be amended).
80. Id. at 35,200 (quoting factors for determining endangered or threatened classification).
81. See Proposed Rule, supra note 25 (discussing changes relating to economic impact of species’ statutory designation).
82. Id. at 35,194 (quoting language agencies sought to remove from Act).
83. Id. (discussing Act’s 1982 amendment).
84. Id. (elaborating on economic factors governing secretaries’ decision). The Proposed Rule indicated that there may be instances where reference to economic impact would be informative to the public, such as analyzing costs and benefits, even though it is not “part of the standard . . . process.” Id. (discussing reference to economic impact in analysis).
2. “Foreseeable Future” Determination

The second revision involving Section Four defined “foreseeable future” since it was neither defined in the statute nor in any regulations. The Proposed Rule sought to adopt the definition as expressed in a 2009 Department of Interior, Office of the Solicitor memorandum. According to the memorandum, “foreseeable future” was interpreted to be the “extent to which the Secretary can reasonably rely on predictions.” This definition, according to the Proposed Rule, would only apply to the period of time which the secretaries could reasonably determine that the existence of a species would have a probable risk of extinction — this period of time does not need to be specific.

Furthermore, the determination prediction, which the agencies proposed, should be based on reliable future threats, not certain threats. In order for a species to qualify under this definition, the Proposed Rule suggested a framework to determine what satisfies the foreseeable future definition. The proposed framework would require an analysis of a plant or animal’s likelihood to become endangered in the foreseeable future, based on a “probable” standard. Utilizing the most accurate information available, this analysis would be done on a case-by-case basis by taking several factors of the species’s existence into consideration.

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85. See id. at 35,195 (proposing framework for assessing “foreseeable future”).
86. Proposed Rule, supra note 25 at 35,195 (identifying source of definition agencies seek to implement).
87. Memorandum from Solicitor on The Meaning of “Foreseeable Future” in Section 3(20) of the Endangered Species Act to Acting Director of U.S. Fish and Wildlife Service (Jan. 16, 2009) (on file with U.S. Fish and Wildlife Services) (interpreting definition of “foreseeable future”). The Solicitor mentioned that the predictions could be based on: (1) threat trends in a species’ population; (2) affects of threats on species’ status; or (3) determination of how future circumstances could create a significant impact on a species. Id. (explaining metrics for determining “foreseeable future” dangers). The memorandum noted these determinations would be made with reliance on available data, and therefore, the results could potentially vary. Id. (stating how prediction results could be affected).
89. Id. (clarifying degree of certainty necessary for foreseeable future predictions).
90. Id. (setting out framework for FWS and NMFS to meet foreseeable future definition). According to the Proposed Rule, both the FWS and NMFS accepted the definition in the Department of Interior’s 2009. Id. (illustrating favorable view of Solicitor’s 2009 interpretation of “foreseeable future”).
91. Id. (providing test for FWS and NMFS to apply when determining species status).
92. Id. (detailing criteria when conducting “foreseeable future” analysis). A case-by-case analysis is the current practice for a foreseeable future determination.
case-by-case analysis would be utilized because a species’s classification as endangered or threatened is unique to the species and the threats towards it, as well as the available data for making these determinations.93

3. Delisting Factors

The fourth revision the FWS and the NMFS presented in the Proposed Rule revised the process for delisting species protected under the ESA.94 The Proposed Rule called for an alignment of the criteria for a species’s designation as endangered or threatened.95 Only after an agency secretary establishes that the statute’s definition of “species” is met, and has evaluated the statute’s delisting factors, will that particular species be listed as endangered or threatened.96

The Proposed Rule further sought to clarify the circumstances rendering a species ineligible for continued protection as endangered or threatened.97 The FWS and the NMFS believed that the proposed clarification would align regulatory language, which was prone to misinterpretation, with the statutory language.98 To do this, the regulatory agencies sought to keep the language permitting the secretary of each agency to delist a species after a review of scientific and commercial data.99 In addition, the Proposed Rule suggested changing the first reason listed for a species’s removal to be its status as extinct.100 Other proposed changes include replacing language that designated a species as “recovered” and delisting those that do not meet the statutory definition of “species.”101

94. See id. at 35,196 (introducing for changes to delisting process).
95. Id. (proposing alteration in standard for determining species’s status as endangered or threatened).
96. Id. (discussing procedure for evaluating species’s status as endangered or threatened).
97. Id. (indicating attempt to clarify regarding species’s ability to remain active on list of endangered or threatened species).
98. See Proposed Rule, supra note 25 (noting agencies’ reasoning for making changes to delisting language of Section Four).
99. Id. (providing quotations of language to remain in regulation).
100. Id. (altering order in which agency delists species).
101. Id. (detailing further changes to Section Four’s listing provisions).
4. Critical Habitat Designations

Further changes to Section Four of the ESA included a non-exhaustive list of instances where the Act would no longer designate a habitat as “critical.”102 This proposal would change the current framework and replace it with the broader authority to find habitats “not prudent.”103 Changes to the framework’s regulatory language included removing the ESA provisions that designated a habitat critical if the designation does not benefit the species.104 The Proposed Rule, furthermore, adds circumstances where critical habitat areas provide no protection for species that have insignificant conservation value outside of the United States.105

The final change to Section Four of the Act concerns “Designated Unoccupied Areas.”106 This proposed change sought to reestablish the secretaries’ evaluation obligation when determining the occupied area of a species, while also clarifying when occupied areas are critical for conservation.107 The FWS and the NMFS sought this change due to the difficulty in determining the occupied space of a species when listing it for protection.108

The current language provides two rationales for a critical habitat limited to occupied areas: (1) the unoccupied area does not guarantee the conservation of the species or (2) designating an unoccupied area as critical is less efficient for conserving the species.109 The agencies justify this change by asserting increased predictability when determining an unoccupied habitat.110 To determine that an unoccupied areas is critical for conservation, the secretaries must establish that there is a reasonable likelihood that

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102. Id. (beginning to discuss additional changes to Section Four).
103. Proposed Rule, supra note 25 (discussing changes to critical habitat framework). Although this change is sought, the Proposed Rule asserted that “not prudent” determinations would still be rare occurrences. Id. (observing how change in framework would not alter determinations).
104. Id. (discussing removal of statutory language regarding critical habitat). The agencies justified this removal with prior court decisions. Id. (providing legal basis for changes). For a discussion of various court rulings, see supra notes 29-75 and accompanying text.
105. Proposed Rule, supra note 25 (adding further statutory language to Act).
106. See generally id. at 35,197 (detailing changes to designated unoccupied areas).
107. Id. at 35,198 (granting increased power to secretaries).
108. Id. (stating justification for proposed changes and authority regarding occupied areas).
109. Id. (providing two ways geography limits critical habitat designation).
the area would in fact protect the species.\textsuperscript{111} To make this determination, the Proposed Rule suggested considering specific factors of area and species.\textsuperscript{112} This portion of the Proposed Rule mentions Section Seven’s interplay with these changes and notes that if the area triggers the interagency consultation requirement, secretaries will consider federal agency actions that the designation potentially affects.\textsuperscript{113}

D. Trump Administration Final Rule

On August 27, 2019, the FWS and the NMFS published the Final Rule detailing the revisions to the ESA, which became effective on September 26, 2019.\textsuperscript{114} The agencies noted that public input during the open comment period influenced changes to the Proposed Rule.\textsuperscript{115} In addition to the proposed revisions, the Final Rule included changes to the definition of “physical or biological features,” which focused on areas that are “essential to the conservation of species” because the prior definition invited opportunity for confusion.\textsuperscript{116} The proposed modifications for prudent determinations of critical habitat and the economic impacts were also finalized as proposed.\textsuperscript{117}

Prior to the publication of the Final Rule, the changes were all minor language modifications.\textsuperscript{118} The standard for “foreseeable future” changed from “probable” to “likely.”\textsuperscript{119} The amended definition of “foreseeable future” now includes future threats that the agency can reasonably determine are “likely.”\textsuperscript{120}

Another distinction between the Proposed Rule and Final Rule includes changes to the factors considered when delisting pro-

\textsuperscript{111} Id. (clarifying when unoccupied areas are critical).

\textsuperscript{112} Id. (listing potential factors for secretary’s consideration).

\textsuperscript{113} Id. (discussing relationship between Section Four change and Section Seven requirement).


\textsuperscript{115} Id. (noting public comments influenced proposed revisions).

\textsuperscript{116} Id. (summarizing briefly changes made from proposed rule to final rule). Changes to the definition of “physical or biological features” were not included in the Proposed Rule. See generally id. (discussing changes to “physical features definition”).

\textsuperscript{117} Id. (mentioning unchanged revision sections).

\textsuperscript{118} See id. (discussing rule changes).

\textsuperscript{119} Final Rule, supra note 114 (stating change from proposed rule to final rule).

\textsuperscript{120} Id. (providing revised definition language).
tected species. Specifically, the agencies amended the language of the section granting the secretaries authority to delist species, replacing “will” with “shall.” The agencies responded to the comments about the delisting process, but ultimately continued the existing removal process.

The Final Rule clarified “not prudent” determinations and the designation of unoccupied areas. Specifically, these changes intended to enhance clarity and reduce confusion. For prudent determinations, the language specifies that the agency’s secretary is to base the determination on the best data available. For unoccupied areas, the determination will now include areas that are not occupied by the species, but are essential to its survival. Finally, in response to concerns over the vagueness of “reasonable likelihood,” the determinations for designating unoccupied areas now require “reasonable certainty.”

III. Public Perspective

When the Proposed Rule was announced, the FWS and the NMFS welcomed comments from the public and all interested parties. All comments were posted online for public access. In total, the agencies received 65,767 comments regarding the proposed changes from members of companies and associations, legal groups, political representatives and organizations, as well as individual citizens.

121. Id. at 45,021 (detailing final rule delisting factors).
122. Id. (asserting language change from proposed rule to final rule).
123. Id. (responding to comments concerning delisting species).
124. See generally Final Rule, supra note 114 (discussing ESA Section Four revision).
125. Id. (stating change justification).
126. Id. (noting new section wording). Previously, the Proposed Rule could be misinterpreted to read that a determination could be made without referencing scientific data, which would go against the ESA. Id. (providing reasoning for change from proposed rule).
127. Id. (explaining changes to designation of unoccupied areas).
128. See id. (changing degree of certainty required of unoccupied areas).
129. Final Rule, supra note 114 (describing public comment procedure).
130. Id. (providing means for public access to comments).
A. Companies and Organizations

The companies and organizations that participated in the comment process were divided in their support for the changes.\textsuperscript{132} The groups that participated ranged from oil associations to zoos and conservation groups.\textsuperscript{133} Groups such as the American Exploration & Mining Association and the Alaska Oil & Gas Association supported the proposed revisions.\textsuperscript{134} Conversely, comments from parties associated with zoos across the nation — like the Albuquerque Bio Park and the American Bird Conservancy — expressed opposition to the proposed changes.\textsuperscript{135}

The supporting groups based their approval of the revisions on the necessity for clarification of the revised provisions.\textsuperscript{136} The American Exploration & Mining Association supported the agencies’ ability to make economic factors for determining decisions

\begin{footnotesize}
\begin{enumerate}
\item[{\textsuperscript{132}}] See generally id. (noting divide in organizations’ support).
\item[{\textsuperscript{133}}] See generally id. (listing comments with organization names).
\item[{\textsuperscript{136}}] Am. Expl. & Mining Ass’n, supra note 134 (stating motivating factor for revision’s support).
\end{enumerate}
\end{footnotesize}
available to the public. The Alaska Oil & Gas Association mirrored the American Exploration & Mining Association’s support.

Opponents of the proposed changes to Section Four are groups involved with species that are protected under the ESA. These groups focused on the impact of the rule change rather than on the clarification of the language. Specifically, the American Bird Conservancy’s comment argued that the proposed changes have the potential to increase the difficulty of: (1) listing species based on the best scientific data available; and (2) conserving and restoring habitats crucial for survival. The American Bird Conservancy provided an alternative solution to addressing concerns with the ESA. They believed the ESA is successful and an increase in funding for the Act would ensure the protection of other species, specifically birds, at risk.

B. Legal Groups

The legal organizations that contributed to the rule proposal process opposed the revisions the agencies offered. Specifically, the groups involved in mainly government legal capacities around the country expressed concern with the revisions. Several state

137. Id. (citing support for economic impact revision). The American Exploration & Mining Associations also expressed support for the remainder of the changes the agencies proposed. Id. (addressing all revisions and signifying support for changes). Additionally, the Alaska Oil & Gas Association agreed with the agencies’ removal of the phrase prohibiting economic impact inquiries. Alaska Oil & Gas Ass’n, supra note 134 (supporting revision to economic impact portion of ESA).

138. Compare Am. Expl. & Mining Ass’n, supra note 134 (supporting rule revisions), with Alaska Oil & Gas Ass’n, supra note 134 (conveying approval for rule changes).

139. Cleveland Metroparks, supra note 135 (noting appreciation for ESA because Act helps their conservation efforts); Hous. Zoo, supra note 135 (stating endangered or threatened species are involved with their operation).

140. See, e.g., Am. Bird Conservancy, supra note 135 (arguing proposed rule change would be detrimental to species).

141. Id. (citing specific areas where rule change could have adverse effects).

142. Id. (suggesting increasing funding for ESA).

143. Id. (citing success of birds protected under ESA and potential for further success with other endangered or threatened bird species).


Aside from the lawsuit, attorneys general from Massachusetts, California, Maryland, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Washington D.C. submitted comments to the agencies discussing their position with regard to the revisions. The letter expressed concern that the proposed changes would “undercut” the programs the ESA established. The drafters argued the change to the listing rule “unlawfully and arbitrarily,” among other things, allows for economic considerations and restricts circumstances which determine whether a species is threatened.

In addition to the various attorneys’ general actions, the New York City Law Department and New York City Bar Association ex-
pressed concerns during the open comment period.\textsuperscript{152} Both organizations made similar arguments and have similar views regarding the changes.\textsuperscript{153} For example, both groups disagree with removing the phrase “without reference to possible economic or other impacts of such determinations.”\textsuperscript{154}

Licensed attorneys are not the only legal participants that took advantage of the public comment period.\textsuperscript{155} The Temple Law Student Animal Legal Defense Fund participated and expressed its opposition.\textsuperscript{156} Students of this organization expressed their “vehement[ ]” opposition, claiming there was no “credible” justification for the changes.\textsuperscript{157} The writers from Temple University’s law school advanced the position that the Proposed Rule could be responsible for the extinction of animals “that represent the spirit of this country.”\textsuperscript{158} Their comment broadly claimed that only “special interest groups” would benefit from the changes, but Americans and protected species would suffer.\textsuperscript{159}

C. Political and Government Perspective

Members of political bodies also made public comments.\textsuperscript{160} Political representatives — including state senators, governors, and

\begin{itemize}
  \item \textsuperscript{152} See generally N.Y.C. Law Dep’t, supra note 145 (urging agencies not to adopt proposed rules); N.Y.C. Bar Ass’n, supra note 145 (explaining why agencies should not finalize proposed changes to ESA).
  \item \textsuperscript{155} See generally N.Y.C. Law Dep’t, supra note 145 (reasoning agencies should not adopt proposed rules); N.Y.C. Bar Ass’n, supra note 145 (detailing opposition to agencies’ proposed rules).
  \item \textsuperscript{156} N.Y.C. Law Dep’t, supra note 145 (noting opposition to consideration of economic impact in delisting species); N.Y.C. Bar Ass’n, supra note 145 (reasoning agencies’ removal of language impermissibly allows agencies to consider economic impact in their determinations). The New York City Bar Association was specifically concerned with the effect removal would have on determinations moving forward. N.Y.C. Bar Ass’n, supra note 145 (providing organization’s specific view).
  \item \textsuperscript{157} See id. (detailing reasons for opposition to rule change).
  \item \textsuperscript{158} Id. (predicting effect of rule change).
  \item \textsuperscript{159} Id. (concluding certain groups would receive benefit from changes while harming species that are intended to be protected).
state environmental agencies — indicated their position with respect to the proposed rule change.161 Unlike the apparent unified opposition to the change from commentators in the legal field, the political respondents were divided.162 The participants from the State of Alaska — specifically State Senator Coghill and the Department of Fish and Game — supported the proposed changes.163 The Alaskan senator’s comment mentioned the frustration the state felt under the areas rich in natural resources designated “critical habitat.”164 State Senator Coghill specifically noted issues attempting to access high petroleum areas of the state due to the determination that those lands were critical habitats.165 Alaska’s Department of Fish and Game echoed Senator Coghill’s support for the revisions and noted that the proposed interpretations aligned better with the ESA’s statutory language and intent.166

Unlike the members of the Alaskan government members who supported the revised interpretation, the State of Nevada Department of Wildlife expressed opposition to the Proposed Rule.167 The Nevada Department of Wildlife — similar to other opposing participants — disagreed with the removal of the phrase “without reference to economic or other impacts,” because doing so “insinuate[d] that economic impacts should be considered.”168 Although the Governor of Wyoming’s comment expressed concerns with the revisions, it did not indicate strong opposition to or support of the

161. See, e.g., Senator John Coghill, supra note 160 (noting position regarding proposed changes to ESA).
164. Senator John Coghill, supra note 160 (discussing frustrations under Obama administration interpretation).
165. Id. (providing new interpretation due to access to resources).
166. State of Alaska, supra note 160 (supporting revised interpretation generally).
167. State of Nev., supra note 160 (discussing opposition to revised interpretation).
168. Id. (discussing opposition to permit economic consideration in determination of delisting decisions in making determinations based on scientific data).
overall changes. The Governor’s comment instead identified additional concerns to consider before making changes. For example, the Governor detailed concerns with the subjective language in the proposed changes, but supported the clarification of the standard to listing and delisting species.

IV. IMPACT

Interestingly, there is a noticeable correlation between what industry a group works in and whether it supported or opposed the ESA revisions. This is especially significant given the environmental impacts that could affect these participants following the changes. The environmental impacts of the changes could reach beyond just loss of species protection, that is, if the concerns that the changes in the way the ESA is interpreted are accurate. While threatened or endangered species destruction would be devastating, the consequences of mining, oil drilling and gas drilling can cause additional “severe” environmental concerns.

Mining — for example — can lead to habitat loss, water loss, pollution, and climate change. As outlined in Section Four of the ESA, mining has the ability to destroy the habitats of surrounding areas. Some have argued that the revised interpretation would increase challenges of designating critical habitats, which could make mining easier, thus harming species which would have been protected by the ESA.

Through deforestation attributed to mining, habitats are lost because the land above the area to be

169. State of Wy., supra note 160 (describing position regarding changes to interpretation of ESA).
170. Id. (detailing portions to be changed).
171. Id. (highlighting concerns that language in Proposed Rule could lead to inconsistent application of ESA).
172. See Am. Expl. & Mining Assoc., supra note 134; Alaska Oil & Gas Assoc., supra note 134; Cleveland Metroparks supra 135; Hous. Zoo, supra note 135 (illustrating divide between different types of organizations).
173. See Am. Bird Conservancy, supra note 135 (explaining concern of impact from changes).
174. See Friedman, supra note 6 (noting revised rule could allow mining, oil drilling, and gas drilling).
176. See id. (describing different impacts mining has on environment).
177. Id. (discussing mining’s destruction of surrounding habitats).
178. See Friedman, supra note 6 (arguing changes make regulation more difficult).
mined is cleared, thus destroying habitats in a process of deforestation.\textsuperscript{179}

The effects of deforestation directly impact species that were previously protected under the ESA, under the former rule.\textsuperscript{180} If the criticism that the revised interpretation makes determining critical habitats more difficult is accurate, species dependent on areas which are now open to mining could lose their home.\textsuperscript{181} In addition to removing trees and other habitats on which animals and plants rely, the process of deforestation can also lead to toxic chemicals and minerals polluting streams, rivers, and other bodies of water.\textsuperscript{182}

Arguments concerning the threat that animals face from mining are not novel.\textsuperscript{183} In fact, lawsuits have been filed in the past against the Trump Administration for endangering species as a result of prioritizing the coal-mining industry’s interests over those of wildlife threatened by pollution.\textsuperscript{184} Conservation groups, such as the Sierra Club, also argue that the rollbacks to ESA interpretation have clear winners – polluting industries like oil, natural gas, drilling, and mining.\textsuperscript{185}

V. Looking Forward

The ESA has played a critical role in protecting certain plant and animal species from extinction.\textsuperscript{186} Animals such as the bald eagle, a United States symbol, have been removed from the endan-

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\item \textsuperscript{179} Effects of Mining on the Environment and Wildlife, supra note 175 (discussing deforestation process of mining).
\item \textsuperscript{180} See id. (discussing effects of deforestation).
\item \textsuperscript{181} Id. (discussing loss of habitat for species).
\item \textsuperscript{182} Id. (mentioning further environmental challenges that come with deforestation).
\item \textsuperscript{183} See Press Release, Center for Biological Diversity, Lawsuit Launched to Force Trump Administration to Protect Endangered Species From Coal Mining in Appalachia (May 10, 2019) (on file with Center for Biological Diversity) (discussing lawsuit against Trump administration to protect endangered species from mining in Appalachia Mountains).
\item \textsuperscript{184} Id. (quoting scientist’s perspective on coal industry interests).
\item \textsuperscript{186} See generally Endangered Species Act: A Wild Success, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/campaigns/esa_wild_success/ (last visited Feb. 6, 2020) (discussing ESA and current setbacks under Trump administration rollbacks).
\end{itemize}
This document discusses changes to the Endangered Species Act (ESA) and the implications of these changes on species protection. The ESA currently lists 1,663 species of plants and animals as either threatened or endangered. Some argue that the Trump Administration’s 2018 revisions to the interpretation of the ESA present obstacles for species that require protection and may no longer receive it. The changes that were finalized included the criteria for listing and delisting species, assessing foreseeable future, and determining critical habitats. As a result of these changes, several climate-conscious parties have expressed concern about the implementation and impact on wildlife. While the changes will not affect species currently listed, future species may not be granted the protective measures needed for survival.

While the executive agencies of the Trump Administration have argued that the revisions are simply attempts to “modernize” the language, the arguments anticipating the weakening and stripping of key provisions of the ESA are persuasive and valid. The ESA has been successful in avoiding the extinction of ninety-nine percent of the species which have been listed. To ensure that vulnerable species of animals and plants are afforded optimal protection, the interpretation and application of the ESA should not be undermined. As the nation’s most effective tool in protecting at-risk species, the ESA should continue to receive bipartisan support.

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189. Id. (discussing attempt to “modernize” ESA).

190. Final Rule, supra note 114, at 45,020 (discussing final changes to ESA interpretation under Trump administration).

191. See Popken, supra note 188 (discussing parties opposed to Trump administration changes).

192. Id. (asserting listed species are unaffected).

193. See Friedman, supra note 6 (discussing how changes weakened Act).


195. See Letter from John A. Vucetich, Professor, Michigan Technological University, to Ryan Zinke, Secretary, Department of Interior and Wilbur Ross, Secretary, Department of Commerce (Sept. 24, 2018) (on file with Center for Biological Diversity) (arguing science should not be taken out of ESA).
port in order to provide effective methods safeguarding listed endangered species.196

Manuel L. Colon Jr.*


* J.D. Candidate, May 2021, Villanova University Charles Widger School of Law; B.S., Homeland Security, 2017, Monmouth University. I would like to first thank my family — especially my mother, father, and grandmother — for everything they have done to help me get to where I am. Without their love, support, and hard work, I would not be the person I am today. Thank you for always believing in me. I would also like to thank my friends who continue to inspire and motivate me every day. I cannot thank you all enough; without each one of you, none of this would have been possible. Much love, always.