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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.<sup>1</sup> 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 to threatened species.<sup>2</sup> In addition, eighty nations met and signed the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1973.<sup>3</sup> Following the CITES treaty, Congress passed the ESA, which President Richard Nixon signed into law.<sup>4</sup>

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1. *History of the Endangered Species Act*, BALLOTPEDIA, [https://ballotpedia.org/History\\_of\\_the\\_Endangered\\_Species\\_Act](https://ballotpedia.org/History_of_the_Endangered_Species_Act) (last visited Jan. 8, 2020) (stating federal government's commencement of conservation protection laws). In 1900, the federal government enacted the Lacey Act, which prohibited illegal wildlife trafficking. *See generally U.S. Lacey Act*, FOREST LEGALITY INITIATIVE, <https://forestlegality.org/policy/us-lacey-act> (last visited Jan. 8, 2020) (stating information regarding Lacey Act and its expansion overtime). *See also* Pat Fisher, *Nation Marks Lacey Act Centennial, 100 Years of Federal Wildlife Law Enforcement*, U.S. FISH & WILDLIFE SERV. (May 30, 2000), <https://www.fws.gov/pacific/news/2000/2000-98.htm> (detailing evolution of Lacey Act).

2. *Endangered Species Act — A History of the Endangered Species Act of 1973 — Timeline*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/timeline.html> (last visited Jan. 9, 2020) [hereinafter *Timeline*] (stating three federal government acts passed for protection of species). The Migratory Treaty Act protects birds, in an agreement between the United States and Great Britain, that travel to and from the United States and Canada. *Id.* (stating purpose of Migratory Bird Treaty Act). The subsequent conservation legislations were expansions on protections for threatened species. *Id.* (illustrating broadened protections for animals).

3. *See Endangered Species Act — A History of the Endangered Species Act of 1973*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/esa-history.html> (last visited Jan. 8, 2020) (mentioning international legislative action of conservation protection). At the time, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was the only international treaty in place to provide protection for plant and animals engaged in international trade. *CITES*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/international/cites/> (last visited Jan. 8, 2020) (indicating international recognition for endangered species protection). 183 parties, including 182 countries and the European Union, have currently agreed to CITES. *Id.* (illustrating international significance of wildlife conversation protection).

4. *Endangered Species Act — A History of the Endangered Species Act of 1973*, *supra* note 3 (stating passage of United States conservation protection legislation). *See also History of the Endangered Species Act*, *supra* note 1 (describing passage of ESA (Act) into law).

The ESA replaced all prior federal conservation protection acts and increased safeguards for plant and animal species identified as threatened or endangered.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

This Comment explores the Trump administration's proposed changes to enforcement of Sections Four and Seven of the ESA.<sup>8</sup> Part II will provide a regulatory overview of the ESA and caselaw discussing the interpretation of the impacted sections.<sup>9</sup> 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.<sup>10</sup> Part IV will conclude by examining the poten-

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5. *Timeline, supra* note 2 (explaining how conservation protection acts evolved through 1900s). The 1973 version of the ESA was amended in 1978, 1982, and 1988. *Endangered Species Act — A History of the Endangered Species Act of 1973, supra* note 3 (referencing significant amendments to Act).

6. Lisa Friedman, *U.S. Significantly Weakens Endangered Species Act*, N.Y. TIMES (Aug. 12, 2019), <https://www.nytimes.com/2019/08/12/climate/endangered-species-act-changes.html> (exemplifying, *inter alia*, species protected under Act). Protections under the ESA currently list over 1,500 plants and animal species and have saved many others such as the bald eagle, American alligator, grizzly bear, and California condor from extinction. Darryl Fears, *The Trump administration weakened Endangered Species Act rules — 17 state attorneys general have sued over it*, THE WASH. POST (Sept. 25, 2019, 4:46 PM), <https://www.washingtonpost.com/climate-environment/2019/09/25/trump-administration-weakened-endangered-species-act-rules-today-state-attorneys-general-sued-over-it/> (mentioning species Act has preserved).

7. See Jasmine Aguilera, *The Trump Administration's Changes to the Endangered Species Act Risks Pushing More Species to Extinction*, TIME (Aug. 4, 2019, 7:55 PM), <https://time.com/5651168/trump-endangered-species-act/> (explaining scientists' concerns with Trump administration's rollbacks to ESA including consideration of "economic factors before categorizing a species as endangered or threatened"). See also *Trump Administration Makes Major Changes To Protections for Endangered Species*, NAT'L PUB. RADIO (Aug. 12, 2019, 6:41 PM), <https://www.npr.org/2019/08/12/750479370/trump-administration-makes-major-changes-to-protections-for-endangered-species> (discussing changes to how ESA is implemented).

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.<sup>11</sup>

## 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.<sup>12</sup> This act authorized the Secretary of the Interior to determine whether certain fish or wildlife species were endangered.<sup>13</sup> 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.<sup>14</sup> Congress later amended the Endangered Species Preservation Act and renamed it to the Endangered Species Conservation Act of 1969.<sup>15</sup> This amendment increased the scope of its predecessor by broadly protecting animals "threatened with worldwide extinction."<sup>16</sup> 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.<sup>17</sup>

Shortly thereafter, in the 1970s, America was in a period of great environmental awareness and activism.<sup>18</sup> 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

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11. For a discussion of potential environmental consequences of the statutory changes, see *infra* notes 172-185 and accompanying text.

12. Endangered Species Preservation Act of 1966, 16 U.S.C. §§ 668aa *et. seq.* (1966) (establishing framework for protection and conservation of endangered and threatened species); see also Michael A. DiSabatino, Annotation, *Validity, construction, and application of Endangered Species Act of 1973*, 32 A.L.R. 332 (1977) (introducing history of ESA).

13. *Endangered Species Act (ESA) Milestones — Pre 1973 ESA*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/esa40/preESA.html> (last updated July 18, 2013) [hereinafter *ESA Milestones*] (granting Secretary of Interior enforcement authority).

14. *Id.* (detailing more information about 1966 conservation act).

15. *Id.* (indicating change to Endangered Species Preservation Act of 1966).

16. *Id.* (stating change to protection under newly amended act).

17. See DiSabatino, *supra* note 12 (justifying necessity of ESA).

18. See generally *Seventies 1970-79*, ENVTL. HIST. TIMELINE, <http://environmentalhistory.org/20th-century/seventies-1970-79/> (last visited Sept. 19, 2020) (illustrating environmental actions throughout decade).

Congressional approval of the ESA.<sup>19</sup> Many of these acts arose from growing public demand for political leadership to address environmental concerns.<sup>20</sup> Congress found the existence of various species critical to the survival of ecosystems and, therefore, certain species required statutory protection against extinction.<sup>21</sup> Despite financing concerns, President Nixon signed the ESA into law.<sup>22</sup>

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 . . . .”<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

#### 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.<sup>26</sup> These cases provide prior judicial interpretation and explanation of: “foreseeable future,” “delisting species,” “critical

19. *Id.* (describing timeline of environmental actions in 1970s).

20. See Meir Rinde, *Richard Nixon and the Rise of American Environmentalism*, SCI. HISTORY INST. (June 2, 2017), <https://www.sciencehistory.org/distillations/richard-nixon-and-the-rise-of-american-environmentalism> (indicating public opinion regarding environmental issues).

21. Endangered Species Act of 1973, 16 U.S.C. § 1531(a) (1988) (stating Congressional findings for ESA).

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).

25. *Endangered Species Act — Overview*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/index.html> (last updated Jan. 30, 2020) (mentioning agencies responsible for enforcing ESA). The FWS’s primary responsibility is terrestrial and freshwater species, while the NMFS deals with marine wildlife. *Id.* (stating each agency’s authority with respect to species). See also *Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat*, 83 Fed. Reg. 35,193 (July 25, 2018) (to be codified at 50 C.F.R. pt. 424) [hereinafter Proposed Rule] (discussing judicial opinions supporting interpretation advocated for in regulatory changes).

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.”<sup>27</sup> These interpretations are critical for the rule’s enforcement and impact on the environment.<sup>28</sup>

### 1. *Foreseeable Future*

During the recent interpretation revision process, the FWS and the NMFS relied on case law to support enforcement changes.<sup>29</sup> For example, *Safari Club International v. Salazar*<sup>30</sup> focuses on the FWS’s decision to classify the polar bear as an endangered species.<sup>31</sup> 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.<sup>32</sup> The agency contended scientific data and reports justified listing the polar bear as an endangered species.<sup>33</sup> 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.<sup>34</sup> 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.”<sup>35</sup>

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.<sup>36</sup> The appellate court’s opinion addressed all of the appellant’s claims in detail.<sup>37</sup> The appellate court found the agency correctly interpreted the term “likely,” but deemed its definition of “foreseeable future” unreasonable.<sup>38</sup> 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.<sup>39</sup> The court also accepted the agency’s foreseeable future determination based on a case-by-case basis.<sup>40</sup>

## 2. *Delisting Species*

In *Friends of Blackwater v. Salazar*,<sup>41</sup> plaintiff (Blackwater), a nonprofit organization, sued the FWS for its decision to delist the West Virginia Northern Flying Squirrel (squirrel).<sup>42</sup> Blackwater claimed that FWS’s removal of the squirrel from the endangered species list violated the ESA.<sup>43</sup> The conservation group argued that the agency’s determination must meet specific objectives measured by the species’s Recovery Plan.<sup>44</sup> 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.<sup>45</sup>

In 1985, the FWS created this Recovery Plan for the squirrel after determining the species was endangered due to its declining population.<sup>46</sup> 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.<sup>47</sup> The FWS employed a

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39. *Id.* at 14-15 (suggesting court’s agreement with agency’s definition of “likely”).

40. *Safari Club Int’l*, 709 F.3d at 15-16 (signaling court’s approval for case-by-case basis determination with foreseeable future analysis).

41. 691 F.3d 428 (D.C. Cir. 2012) (challenging FWS’s decision to remove squirrel from endangered species list).

42. 39 *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).

43. *Friends of Blackwater*, 691 F.3d at 432 (citing one claim against FWS).

44. *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).

45. *Friends of Blackwater*, 691 F.3d at 432 (stating FWS’s position with respect to Blackwater’s first claim).

46. *Id.* at 430 (describing circumstance for listing squirrel as endangered).

47. *Id.* at 430-31 (listing criteria for removal). The criteria for removal included:

biologist to study the squirrel and ultimately determine its status.<sup>48</sup> A 2006 report showed that the squirrel's population increased from ten, its 1985 total, to 1,063.<sup>49</sup> 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."<sup>50</sup> 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.<sup>51</sup> The appellate court found that, based on the language of the statute, either parties' interpretation of the statute could be valid.<sup>52</sup> The court, however, accepted the agency's interpretation.<sup>53</sup>

### 3. Critical Habitat

The FWS and the NMFS cited *Natural Resources Defense Council v. United States Department of Interior*<sup>54</sup> as another supporting authority for their proposed revision to "critical habitat."<sup>55</sup> The issue in *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.<sup>56</sup> The California gnatcatcher, a

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1. [S]quirrel populations are stable or expanding . . . in a minimum of 80% of all Geographic Recovery Areas [GRAs] designated for the subspecies,
  2. [S]ufficient ecological data and timber management data have been accumulated to assure future protection and management . . .
  3. GRAs are managed in perpetuity to ensure: (a) sufficient habitat . . . and (b) habitat corridors . . . [and]
  4. [T]he existence of the high elevation forests on which the squirrels depend is not itself threatened by introduced pests . . . or by environmental pollutants. . . .

*Id.* at 431 (detailing criteria for removal).

48. *Friends of Blackwater*, 691 F.3d at 431 (illustrating agency's action toward determining species's status seventeen years after being classified as endangered).

49. *Id.* (noting species's population increase). At the time, the Secretary of Interior interpreted this finding to mean the squirrel's population was "robust." *Id.* (providing Secretary of Interior's opinion regarding squirrel's status following independent report).

50. *Id.* (seeking to remove species from endangered list).

51. *Id.* at 429 (discussing procedural posture of case).

52. *Id.* at 433 (mentioning different ways for interpretation).

53. *Friends of Blackwater*, 691 F.3d at 436 (finding in favor of agency).

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

55. See Proposed Rule, *supra* note 25 (citing case law in agencies' justification for revision).

56. *Nat. Res. Def. Council*, 113 F.3d at 1123 (stating issue to be decided by appellate court). The lower court denied plaintiffs' summary judgment motion and granted defendant's summary judgment motion. *Id.* (providing procedural posture of lower court).



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.<sup>57</sup> Section Four of the ESA requires the FWS to create a critical habitat for at-risk species.<sup>58</sup> 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.<sup>59</sup> The FWS concluded that a critical habitat determination would not meet the Section Four meaning of "prudent."<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup> Ultimately, the United States Court of Appeals for the Ninth Circuit reversed the lower court's grant of summary judgment to the Agency.<sup>64</sup> The Ninth Circuit remanded the case, concluding the FWS's actions were an abuse of discretion.<sup>65</sup>

#### 4. *Unoccupied Areas*

In *Otay Mesa Property L.P. v. United States Department of Interior*,<sup>66</sup> 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.<sup>67</sup> Applying administrative law

57. *Id.* (citing status of California gnatcatcher under ESA).

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).

59. *Id.* (discussing habitat needed for California gnatcatchers).

60. *Id.* (discussing justification for FWS's conclusion regarding critical habitat determination for California gnatcatcher).

61. *Nat. Res. Def. Council*, 113 F.3d at 1125 (providing first reason for declining critical habitat determination).

62. *Id.* (finding against FWS with respect to critical habitat determination).

63. *Id.* at 1125-26 (stating second reason for conclusion).

64. *Id.* at 1127 (providing Ninth Circuit's holding).

65. *Id.* (providing procedural directions for lower court on remand).

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).

67. *Id.* at 75 (discussing reason for bringing claim). On appeal, both parties filed motions for summary judgement. *Id.* (explaining procedural posture for appellate court).

principles to the parties' cross summary judgment motions, the district court granted the FWS's motion.<sup>68</sup> The court, however, found the Agency's designation to be "thin" after analyzing the evidence of fairy shrimp's occupation of the land.<sup>69</sup> The property owners argued against the Agency's critical habitat designation, claiming it lacked sufficient proof.<sup>70</sup> The court concluded the FWS's designation should have occurred the moment the Agency classified the fairy shrimp as "endangered."<sup>71</sup>

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.<sup>72</sup> Ultimately, the court ruled that the FWS properly designated the plaintiffs's property as part of the fairy shrimp's critical habitat.<sup>73</sup> The FWS claimed two fairy shrimp sightings, one in 1997 and one at the time of litigation, were sufficient to establish occupation.<sup>74</sup> 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.<sup>75</sup>

### 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.<sup>76</sup>

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 Otoy 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.”<sup>77</sup> Specifically, the Proposed Rule asserted the agencies’ desired change to enforcement of Section Four of the Act.<sup>78</sup> Section Four provides factors for determining a species’s designation as endangered or threatened, reclassified, or removed.<sup>79</sup> 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.<sup>80</sup>

#### 1. *Economic Impact Consideration*

One revision to Section Four affects the parameters by which each agency’s secretary evaluates a species’s status.<sup>81</sup> The secretaries expressed the need to remove the phrase “without reference to possible economic or other impacts of such determination[. . .]”<sup>82</sup> 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.<sup>83</sup> The agencies asserted that removal of this phrase would not change the standard by which they determine species’ statuses.<sup>84</sup>

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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).

79. 16 U.S.C. § 1533(a) (2003) (listing factors Secretaries of Interior and Commerce evaluate prior to adding species to protected list).

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.<sup>85</sup> The Proposed Rule sought to adopt the definition as expressed in a 2009 Department of Interior, Office of the Solicitor memorandum.<sup>86</sup> According to the memorandum, “foreseeable future” was interpreted to be the “extent to which the Secretary can reasonably rely on predictions.”<sup>87</sup> 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.<sup>88</sup>

Furthermore, the determination prediction, which the agencies proposed, should be based on reliable future threats, not certain threats.<sup>89</sup> In order for a species to qualify under this definition, the Proposed Rule suggested a framework to determine what satisfies the foreseeable future definition.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> A

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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).

88. Proposed Rule, *supra* note 25, at 35,195 (limiting scope of “foreseeable future”).

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.<sup>93</sup>

### 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.<sup>94</sup> The Proposed Rule called for an alignment of the criteria for a species's designation as endangered or threatened.<sup>95</sup> 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.<sup>96</sup>

The Proposed Rule further sought to clarify the circumstances rendering a species ineligible for continued protection as endangered or threatened.<sup>97</sup> The FWS and the NMFS believed that the proposed clarification would align regulatory language, which was prone to misinterpretation, with the statutory language.<sup>98</sup> 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.<sup>99</sup> In addition, the Proposed Rule suggested changing the first reason listed for a species's removal to be its status as extinct.<sup>100</sup> Other proposed changes include replacing language that designated a species as "recovered" and delisting those that do not meet the statutory definition of "species."<sup>101</sup>

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on a species's extinction status. *Id.* (illustrating no change in procedure of determination).

93. Proposed Rule, *supra* note 25, at 35,195 (justifying significance of maintaining case-by-case analysis for each species).

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.”<sup>102</sup> This proposal would change the current framework and replace it with the broader authority to find habitats “not prudent.”<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

The final change to Section Four of the Act concerns “Designated Unoccupied Areas.”<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup>

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.<sup>109</sup> The agencies justify this change by asserting increased predictability when determining an unoccupied habitat.<sup>110</sup> 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).

110. Endangered and Threatened Wildlife and Plants, 83 Fed. Reg. at 35,198 (justifying rule change).

the area would in fact protect the species.<sup>111</sup> To make this determination, the Proposed Rule suggested considering specific factors of area and species.<sup>112</sup> 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.<sup>113</sup>

#### 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.<sup>114</sup> The agencies noted that public input during the open comment period influenced changes to the Proposed Rule.<sup>115</sup> 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.<sup>116</sup> The proposed modifications for prudent determinations of critical habitat and the economic impacts were also finalized as proposed.<sup>117</sup>

Prior to the publication of the Final Rule, the changes were all minor language modifications.<sup>118</sup> The standard for "foreseeable future" changed from "probable" to "likely."<sup>119</sup> The amended definition of "foreseeable future" now includes future threats that the agency can reasonably determine are "likely."<sup>120</sup>

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

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111. *Id.* (clarifying when unoccupied areas are critical).

112. *Id.* (listing potential factors for secretary's consideration).

113. *Id.* (discussing relationship between Section Four change and Section Seven requirement).

114. *See generally* Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 424) [hereinafter Final Rule] (specifying details of publication).

115. *Id.* (noting public comments influenced proposed revisions).

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").

117. *Id.* (mentioning unchanged revision sections).

118. *See id.* (discussing rule changes).

119. Final Rule, *supra* note 114 (stating change from proposed rule to final rule).

120. *Id.* (providing revised definition language).

tected species.<sup>121</sup> Specifically, the agencies amended the language of the section granting the secretaries authority to delist species, replacing “will” with “shall.”<sup>122</sup> The agencies responded to the comments about the delisting process, but ultimately continued the existing removal process.<sup>123</sup>

The Final Rule clarified “not prudent” determinations and the designation of unoccupied areas.<sup>124</sup> Specifically, these changes intended to enhance clarity and reduce confusion.<sup>125</sup> For prudent determinations, the language specifies that the agency’s secretary is to base the determination on the best data available.<sup>126</sup> For unoccupied areas, the determination will now include areas that are not occupied by the species, but are essential to its survival.<sup>127</sup> Finally, in response to concerns over the vagueness of “reasonable likelihood,” the determinations for designating unoccupied areas now require “reasonable certainty.”<sup>128</sup>

### III. PUBLIC PERSPECTIVE

When the Proposed Rule was announced, the FWS and the NMFS welcomed comments from the public and all interested parties.<sup>129</sup> All comments were posted online for public access.<sup>130</sup> 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.<sup>131</sup>

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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 *supra* 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).

131. *See Revision of the Regulations for Listing Species and Designating Critical Habitat*, REGULATIONS.GOV, <https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=FWS-HQ-ES-2018-0006&refD=FWS-HQ-ES-2018-0006-0001> (last visited Jan. 28, 2020) (providing proposed rule comment results). For the purpose of this Comment, comments made by respondents in an individual capacity are not discussed.



### A. Companies and Organizations

The companies and organizations that participated in the comment process were divided in their support for the changes.<sup>132</sup> The groups that participated ranged from oil associations to zoos and conservation groups.<sup>133</sup> Groups such as the American Exploration & Mining Association and the Alaska Oil & Gas Association supported the proposed revisions.<sup>134</sup> 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.<sup>135</sup>

The supporting groups based their approval of the revisions on the necessity for clarification of the revised provisions.<sup>136</sup> The American Exploration & Mining Association supported the agencies' ability to make economic factors for determining decisions

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132. *See generally id.* (noting divide in organizations' support).

133. *See generally id.* (listing comments with organization names).

134. Am. Expl. & Mining Ass'n, Comment Letter on Proposed Rule to Revision of Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 28, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-59153>; Alaska Oil and Gas Ass'n, Comment Letter on Proposed Rule to Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 4, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-59330> (expressing support for proposed rule revision).

135. Albuquerque Bio Park, Comment Letter on Proposed Rules to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 22, 2018), <https://beta.regulations.gov/document/FWS-HQ-ES-2018-0006-0001> (stating opposition to regulations' revisions); Cincinnati Zoo, Comment Letter on Proposed Rule to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 24, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-55413> (expressing concern for rule changes); Cleveland Metroparks, Comment Letter on Proposed Rules to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 21, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-42795> (opposing agencies' revisions to regulations for ESA); Hous. Zoo, Comment Letter on Proposed Rule to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 24, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-55237> (conveying concerns with proposed rules); Am. Bird Conservancy, Comment Letter on Proposed Rules to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 21, 2018) (expressing opposition to proposed rule revisions).

136. Am. Expl. & Mining Ass'n, *supra* note 134 (stating motivating factor for revision's support).

available to the public.<sup>137</sup> The Alaska Oil & Gas Association mirrored the American Exploration & Mining Association's support.<sup>138</sup>

Opponents of the proposed changes to Section Four are groups involved with species that are protected under the ESA.<sup>139</sup> These groups focused on the impact of the rule change rather than on the clarification of the language.<sup>140</sup> 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.<sup>141</sup> The American Bird Conservancy provided an alternative solution to addressing concerns with the ESA.<sup>142</sup> 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.<sup>143</sup>

## B. Legal Groups

The legal organizations that contributed to the rule proposal process opposed the revisions the agencies offered.<sup>144</sup> Specifically, the groups involved in mainly government legal capacities around the country expressed concern with the revisions.<sup>145</sup> Several state

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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).

144. *See generally* Proposed Rule, *supra* note 25, at 35,193 (asking public for comments to proposed changes and detailing revisions); Comment Letters Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, <https://beta.regulations.gov/document/FWS-HQ-ES-2018-0006-0001/comment> (last visited Oct. 7, 2020) (listing public comments to rule change).

145. Att'y's Gen. of Mass., Cal., Md., N.Y., Or., Pa., Vt., Wash., and D.C., Comment Letter on Proposed Rules to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept.

attorneys general and conservation groups filed suit against the Trump Administration.<sup>146</sup> The attorney generals claimed that the changes “substantially weakened” the ESA protections.<sup>147</sup> Attorneys general from Colorado, Connecticut, Illinois, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Washington D.C. supported the federal lawsuit.<sup>148</sup>

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.<sup>149</sup> The letter expressed concern that the proposed changes would “undercut” the programs the ESA established.<sup>150</sup> 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.<sup>151</sup>

In addition to the various attorneys’ general actions, the New York City Law Department and New York City Bar Association ex-

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24, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-57365> (arguing proposed rules undercut ESA’s purpose); N.Y.C. Law Dep’t, Comment Letter on Proposed Rule to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 24, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-55233> (stating agencies should not adopt proposed rule); N.Y.C. Bar Ass’n, Comment Letter on Proposed Rules to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 20, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-40216> (noting proposed amendments would weaken protections for endangered and threatened species); Temple Student Animal Legal Def. Fund, Comment Letter on Proposed Rule to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 24, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-53712> (detailing opposition to proposed regulatory changes).

146. See generally Fears, *supra* note 6 (discussing lawsuits filed by states in opposition to changes to ESA); *Lawsuit Challenges Trump Administration Attack on Endangered Species Act*, EARTHJUSTICE (Aug. 21, 2019), <https://earthjustice.org/news/press/2019/lawsuit-challenges-trump-administration-attack-on-endangered-species-act> (providing further information regarding lawsuit against Trump administration’s changes to ESA).

147. Fears, *supra* note 6 (citing position of several states’ attorneys general).

148. *Id.* (stating states where attorneys general have joined suit against Trump administration). Washington D.C. and New York City have also joined the lawsuit. *Id.* (illustrating size of opposing party in federal suit).

149. Att’y Gen. of Mass., Cal., Md., N.Y., Or., Pa., Vt., Wash., and D.C., *supra* note 145 (informing agencies about opposition to changes).

150. *Id.* (summarizing effect changes would have on ESA).

151. *Id.* (listing concerns with changes to delisting species rule).

pressed concerns during the open comment period.<sup>152</sup> Both organizations made similar arguments and have similar views regarding the changes.<sup>153</sup> For example, both groups disagree with removing the phrase “without reference to possible economic or other impacts of such determinations.”<sup>154</sup>

Licensed attorneys are not the only legal participants that took advantage of the public comment period.<sup>155</sup> The Temple Law Student Animal Legal Defense Fund participated and expressed its opposition.<sup>156</sup> Students of this organization expressed their “vehement[ ]” opposition, claiming there was no “credible” justification for the changes.<sup>157</sup> 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.”<sup>158</sup> Their comment broadly claimed that only “special interest groups” would benefit from the changes, but Americans and protected species would suffer.<sup>159</sup>

### C. Political and Government Perspective

Members of political bodies also made public comments.<sup>160</sup> Political representatives — including state senators, governors, and

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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).

153. 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).

154. 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).

155. See, e.g., Temple Law Student Animal Legal Def. Fund, *supra* note 145 (showing law students have interest in changes to ESA).

156. See *id.* (detailing reasons for opposition to rule change).

157. See *id.* (illustrating students’s strong opposition to changes).

158. *Id.* (predicting effect of rule change).

159. See *id.* (concluding certain groups would receive benefit from changes while harming species that are intended to be protected).

160. See generally Senator John Coghill, Comment Letter on Proposed Rules to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Aug. 21, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-0769> State of Wyo., Comment Letter on Proposed Rules to Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 24, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-59914>; State of Nev., Comment Letter on Proposed Rules to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating

state environmental agencies — indicated their position with respect to the proposed rule change.<sup>161</sup> Unlike the apparent unified opposition to the change from commentators in the legal field, the political respondents were divided.<sup>162</sup> The participants from the State of Alaska — specifically State Senator Coghill and the Department of Fish and Game — supported the proposed changes.<sup>163</sup> The Alaskan senator’s comment mentioned the frustration the state felt under the areas rich in natural resources designated “critical habitat.”<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup>

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.<sup>167</sup> 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.”<sup>168</sup> Although the Governor of Wyoming’s comment expressed concerns with the revisions, it did not indicate strong opposition to or support of the

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Critical Habitat (Sept. 24, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-59338>; State of Alaska, Comment Letter on Proposed Rules to Revise Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (Sept. 24, 2018), <https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-58866> (representing political groups interested in rule change).

161. *See, e.g.*, Senator John Coghill, *supra* note 160 (noting position regarding proposed changes to ESA).

162. *Compare* Senator John Coghill, *supra* note 160 *and* State of Alaska, *supra* note 160, *with* State of Nev., *supra* note 160 (illustrating differing views on changes).

163. Senator John Coghill, *supra* note 160; State of Alaska, *supra* note 160 (supporting ESA interpretation changes).

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.<sup>169</sup> The Governor's comment instead identified additional concerns to consider before making changes.<sup>170</sup> 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.<sup>171</sup>

#### IV. IMPACT

Interestingly, there is a noticeable correlation between what industry a group works in and whether it supported or opposed the ESA revisions.<sup>172</sup> This is especially significant given the environmental impacts that could affect these participants following the changes.<sup>173</sup> 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.<sup>174</sup> While threatened or endangered species destruction would be devastating, the consequences of mining, oil drilling and gas drilling can cause additional "severe" environmental concerns.<sup>175</sup>

Mining — for example — can lead to habitat loss, water loss, pollution, and climate change.<sup>176</sup> As outlined in Section Four of the ESA, mining has the ability to destroy the habitats of surrounding areas.<sup>177</sup> 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.<sup>178</sup> Through deforestation attributed to mining, habitats are lost because the land above the area to be

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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).

175. See *Effects of Mining on the Environment and Wildlife*, PEGASUS FOUND. (Mar. 9, 2017), <https://www.pegasusfoundation.org/effects-of-mining-environment-wildlife/> (detailing environmental issues following mining).

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.<sup>179</sup>

The effects of deforestation directly impact species that were previously protected under the ESA, under the former rule.<sup>180</sup> 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.<sup>181</sup> 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.<sup>182</sup>

Arguments concerning the threat that animals face from mining are not novel.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup>

## V. LOOKING FORWARD

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

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179. *Effects of Mining on the Environment and Wildlife*, *supra* note 175 (discussing deforestation process of mining).

180. *See id.* (discussing effects of deforestation).

181. *Id.* (discussing loss of habitat for species).

182. *Id.* (mentioning further environmental challenges that come with deforestation).

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).

184. *Id.* (quoting scientist's perspective on coal industry interests).

185. Jonathan Hahn, *Who Benefits From Endangered Species Act Rollback? Big Polluters.*, SIERRA CLUB (Aug. 13, 2019), <https://www.sierraclub.org/sierra/who-benefits-endangered-species-act-rollback-big-polluters> (discussing how rollbacks are advantageous to certain industries and harmful to species).

186. *See generally Endangered Species Act: A Wild Success*, CTR. FOR BIOLOGICAL DIVERSITY, [https://www.biologicaldiversity.org/campaigns/esa\\_wild\\_success/](https://www.biologicaldiversity.org/campaigns/esa_wild_success/) (last visited Feb. 6, 2020) (discussing ESA and current setbacks under Trump administration rollbacks).

gered species list because of the ESA's protections.<sup>187</sup> The ESA currently lists 1,663 species of plants and animals as either threatened or endangered.<sup>188</sup> Some argue 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.<sup>189</sup> The changes that were finalized included the criteria for listing and delisting species, assessing foreseeable future, and determining critical habitats.<sup>190</sup> As a result of these changes, several climate-conscious parties have expressed their concern with the implementation and impact on wildlife the new rules could have.<sup>191</sup> While the changes will not affect species currently listed, future species may not be granted the protective measures needed for survival.<sup>192</sup>

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.<sup>193</sup> The ESA has been successful in avoiding the extinction of ninety-nine percent of the species which have been listed.<sup>194</sup> To ensure that vulnerable species of animals and plants are afforded optimal protection, the interpretation and application of the ESA should not be undermined.<sup>195</sup> As the nation's most effective tool in protecting at-risk species, the ESA should continue to receive bipartisan sup-

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187. *Recovering threatened and endangered species*, U.S. FISH AND WILDLIFE SERV., <https://www.fws.gov/southeast/endangered-species-act/recovery/> (last visited March 31, 2020) (listing species removed from endangered species list or downgraded from endangered to threatened); see also Rebecca Heisman, *Bald Eagle, The Ultimate Endangered Species Act Success Story*, AM. BIRD CONSERVANCY (May 24, 2018), <https://abcbirds.org/bald-eagle-the-ultimate-endangered-species-act-success-story/> (discussing how ESA protections rescued bald eagle).

188. Lindsey Popken, *How Will the 2019 Changes to the Endangered Species Act Impact Wildlife?*, U. WASH. SCH. OF MARINE AND ENVTL. AFF. (Nov. 4, 2019), <https://smea.uw.edu/currents/how-will-the-2019-changes-to-the-endangered-species-act-impact-wildlife/> (mentioning species protected under ESA).

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).

194. *US Endangered Species Act*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/pages/the-us-endangered-species-act> (last visited Mar. 31, 2020) (explaining success of ESA).

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.<sup>196</sup>

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196. See *US Endangered Species Act*, *supra* note 194 (indicating bipartisan support for ESA when passed in 1973).

\* 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.