

# PROPOSED CHANGES TO THE ENDANGERED SPECIES ACT

Noëlle Mouton

## I. INTRODUCTION

Since its inception in 1973, the Endangered Species Act (ESA) has protected more than 1,600 endangered and threatened species of plants and animals in the United States,<sup>1</sup> including the American Alligator, California Condor, Eastern Red Wolf, American Gray Wolf, Grizzly Bear, and Bald Eagle, just to name a few.<sup>2</sup> Each of these and many others immeasurably impact our ecosystem, from keeping other animal species and vegetation in check to establishing the surrounding geography and landscape.<sup>3</sup>

Over the past several years, amendments to the ESA have continued to undermine its vitality. The biggest changes have occurred during the current administration and are likely to be approved in the coming months,<sup>4</sup> now that the 60-day public comment period has ended.<sup>5</sup> While the rollbacks proposed are numerous, there are two substantial changes that would have the largest impact on the current application of the ESA. The first major change would be to cease the practice of treating species classified as “threatened” with the same protection as those species classified as “endangered.”<sup>6</sup> The second detrimental revision would make it possible to

---

<sup>1</sup> J. Weston Phippen, *Congress is Quietly Eroding the Endangered Species Act*, OUTSIDE ONLINE (Oct. 11, 2018), <https://www.outsideonline.com/2353896/endangered-species-act-quietly-danger>.

<sup>2</sup> *Animals Saved by the U.S. Endangered Species Act*, ALL ABOUT WILDLIFE, <http://www.allaboutwildlife.com/animals-saved-by-the-u-s-endangered-species-act>.

<sup>3</sup> Caeleigh MacNeil, *How Wolves Saved the Foxes, Mice and Rivers of Yellowstone National Park*, EARTH JUSTICE (Oct. 26, 2016), <https://earthjustice.org/blog/2015-july/how-wolves-saved-the-foxes-mice-and-rivers-of-yellowstone-national-park>.

<sup>4</sup> *ESA Implementation: Regulation Revisions*, U.S. FISH & WILDLIFE SERV.: ENDANGERED SPECIES (Aug. 14, 2018), [https://www.fws.gov/endangered/improving\\_ESA/regulation-revisions.html](https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html).

<sup>5</sup> *Scientists Voice Opposition to Changes in US Endangered Species Act*, VOICE OF AMERICA (Sept. 24, 2018), <https://www.voanews.com/a/scientists-voice-opposition-to-changes-in-us-endangered-species-act/4585882.html>.

<sup>6</sup> Darryl Fears, *Endangered Species Act Stripped of Key Provisions in Trump Administration Proposal*, WASH. POST (July 19, 2018), [https://www.washingtonpost.com/news/animalia/wp/2018/07/19/endangered-species-act-stripped-of-key-provisions-in-trump-administration-proposal/?noredirect=on&utm\\_term=.177680764d03](https://www.washingtonpost.com/news/animalia/wp/2018/07/19/endangered-species-act-stripped-of-key-provisions-in-trump-administration-proposal/?noredirect=on&utm_term=.177680764d03).

include cost factors when determining the classification of species.<sup>7</sup> Both of these substantial changes could have an irreversible effect on the existence of many species with struggling numbers.

This paper will first provide some background information on the current procedures of classifying and protecting plant and animal species as outlined by the ESA. Then it will discuss the proposed changes, focusing on these two major changes in detail, and analyze their potential effects on the current process and their future consequences.

## II. BACKGROUND

The ESA was signed into law by President Nixon in 1973 to provide protection for threatened and endangered species and habitats<sup>8</sup> from destruction, pollution, pesticides, predation, disease, and any other natural or man-made factors that could potentially contribute to their extinction.<sup>9</sup> According to the U.S. Fish and Wildlife Service, its purpose is to “protect and recover imperiled species and the ecosystems upon which they depend.”<sup>10</sup> In addition to the Interior Department’s U.S. Fish and Wildlife Service (FWS), the Commerce Department’s National Marine Fisheries Service (NMFS) is the other agency that administers the ESA.<sup>11</sup> Generally, the FWS handles terrestrial and freshwater species while NMFS covers classification and protection of marine life.<sup>12</sup>

---

<sup>7</sup> *Id.*

<sup>8</sup> *Summary of the Endangered Species Act*, U.S. ENVTL. PROTECTION AGENCY (Aug. 8, 2017), <https://www.epa.gov/laws-regulations/summary-endangered-species-act>.

<sup>9</sup> 16 U.S.C. § 1531 (2018).

<sup>10</sup> *Endangered Species Act: Overview*, U.S. FISH & WILDLIFE SERV. (Nov. 1, 2017), <https://www.fws.gov/endangered/laws-policies/index.html>.

<sup>11</sup> *About the Endangered Species Protection Program*, U. S. ENVTL. PROTECTION AGENCY (May 29, 2018), <https://www.epa.gov/endangered-species/about-endangered-species-protection-program>.

<sup>12</sup> *ESA Basics*, U.S. FISH & WILDLIFE SERV., 1 (Jan. 2013), [https://www.fws.gov/endangered/esa-library/pdf/ESA\\_basics.pdf](https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf).

Under the ESA, there are five elements that the FWS and NMFS consider when listing a species as threatened or endangered: “(1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence.”<sup>13</sup> If a species is found to be on the brink of extinction upon scientific and commercial data analysis, then the species is listed as “endangered.”<sup>14</sup> If a species is likely to become endangered in the foreseeable future, then it is classified as “threatened.”<sup>15</sup> The protection of threatened and endangered animal species generally includes prohibiting “take” of the species, meaning prohibition of any individual to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.”<sup>16</sup> The recovery plan for each species is individually determined by biologists, experts, Federal, State, and local agencies, and other organizations with relevant interest, and is enforced however those experts or agencies determine fit.<sup>17</sup> In the 45 years that the ESA has been in effect, over 1,600 species have been protected, and 51 species have been delisted after their numbers substantially increased.<sup>18</sup> While these numbers are impressive, they still show that there is a long way to go before the preservation has been ensured for the remaining species on the list.

### **III. CHANGES IN PROTECTION OF “THREATENED” VERSUS “ENDANGERED” SPECIES**

Under the ESA, “[w]henver any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the

---

<sup>13</sup> 16 U.S.C. § 1533(a)(1).

<sup>14</sup> 16 U.S.C. § 1533(b).

<sup>15</sup> See *What is the Difference Between Endangered and Threatened*, U.S. FISH & WILDLIFE SERV. (Oct. 15, 2018), <https://www.fws.gov/midwest/wolf/esastatus/e-vs-t.htm>. See also 16 U.S.C. § 1532(20).

<sup>16</sup> 16 U.S.C. § 1532(19).

<sup>17</sup> *ESA Basics*, *supra* note 12, at 1.

<sup>18</sup> Phippen, *supra* note 1.

conservation of such species.”<sup>19</sup> Additionally, under the Recovery Plans provision of the ESA, threatened and endangered species are both equally entitled to a species-specific plan that would promote the conservation of the species “to the maximum extent practicable.”<sup>20</sup> This demonstrates that the importance of affording protection to threatened species is of equal importance to the protection of endangered species. According to the FWS, “[o]nce we add an animal or plant to the List, protective measures apply,” including prohibition of take, implementation of recovery plans and habitat developments, and acquisition of Federal aid.<sup>21</sup> Noticeably, there is no distinction under section 4 between threatened and endangered species, as they are both on the list, and the same factors are used in determining classification of both.<sup>22</sup>

Furthermore, the Protective Regulations Section 4(d) Rule of the ESA has been known as the “blanket rule” since 1978 because it specifies that “threatened species get all of the protections that endangered species automatically get through section 9.”<sup>23</sup> Section 9 prohibits all take, import, export, delivery, receipt, sale, and transport of listed species.<sup>24</sup> Unless a particular scientific reason establishes a special provision for a particular species that warrants exclusion of some of the provisions of Section 9, all of the Section 9 protection is applied.<sup>25</sup> Thus, although the FWS is given the opportunity to make the regulations a bit more flexible for threatened species if supported by the research, the agency’s default action is to treat threatened species

---

<sup>19</sup> 16 U.S.C. § 1533(d).

<sup>20</sup> 16 U.S.C. § 1533(f)(1).

<sup>21</sup> *Listing a Species as a Threatened or Endangered Species*, U.S. FISH & WILDLIFE SERV., 2 (Aug. 2016), <https://www.fws.gov/endangered/esa-library/pdf/listing.pdf>.

<sup>22</sup> 16 U.S.C. § 1533(b).

<sup>23</sup> *Endangered Species Act Special Rules: Questions and Answers*, U.S. FISH & WILDLIFE SERV., 1 (Feb. 2014), [https://www.fws.gov/mountain-prairie/factsheets/ESA%20SpecialRules%20Factsheet\\_020714.pdf](https://www.fws.gov/mountain-prairie/factsheets/ESA%20SpecialRules%20Factsheet_020714.pdf) [hereinafter *Endangered Species Act Special Rules*].

<sup>24</sup> 16 U.S.C. § 1538(a)(1).

<sup>25</sup> *Endangered Species Act Special Rules*, *supra* note 23.

with the same protection offered to endangered species in the hopes that they will be delisted as opposed to reclassified as endangered in the future,<sup>26</sup> which is the purpose of the ESA.<sup>27</sup>

The rollbacks proposed by the Trump administration on July 19<sup>th</sup> would completely reverse the blanket rule.<sup>28</sup> While the proposed changes would not negatively affect species already listed, they would stipulate that every species listed as threatened in the future would not have the same inherent protections as those species classified as endangered.<sup>29</sup> While some argue that management will be better tailored for each species,<sup>30</sup> it will be much more difficult for species to be listed, since they will now only be afforded protections on a case-by-case basis instead of automatically receiving all of the section 9 protections.<sup>31</sup>

Furthermore, many additional resources will be required to provide for an individual rule for each listed species, making the process less efficient and most likely preventing future species from being listed.<sup>32</sup> This would also require additional funding, which is difficult to obtain.

The “foreseeable future” designations used to determine whether a species should be classified as threatened would now also be determined on an individual basis.<sup>33</sup> This means that the term “foreseeable future” will take on a much narrower interpretation of the language than previously used, adding a more specified framework that “foreseeable” must fall in, which might

---

<sup>26</sup> *Id.*

<sup>27</sup> *About the Endangered Species Protection Program*, *supra* note 11.

<sup>28</sup> Madilyn Jarman, *USFWS and NOAA Fishers Propose ESA Changes*, WILDLIFE SOC’Y. (Aug. 3, 2018), <http://wildlife.org/usfws-and-noaa-fisheries-propose-esa-changes/>.

<sup>29</sup> *Id.*

<sup>30</sup> Madilyn Jarman, *Potential ESA Changes Could Affect Threatened Species*, WILDLIFE SOC’Y. (Apr. 18, 2018), <http://wildlife.org/potential-esa-changes-could-affect-threatened-species/>.

<sup>31</sup> Phippen, *supra* note 1.

<sup>32</sup> Laura Bies, *TWS Submits Comments on Proposed ESA Changes*, WILDLIFE SOC’Y. (Sept. 25, 2018), <http://wildlife.org/tws-submits-comments-on-proposed-esa-changes/>.

<sup>33</sup> Jarman, *supra* note 28.

delay protection for species that need it.<sup>34</sup> The current interpretations of threatened species are clearer, more efficient in practice, and better fulfill the purpose of the ESA by offering greater protections to endangered species as well as species that are likely to become endangered in the foreseeable future.<sup>35</sup>

#### IV. OTHER SIGNIFICANT ROLLBACKS

In addition to revoking the blanket rule, the Trump administration is also proposing to change the meaning of “critical habitat” under section 4 as well.<sup>36</sup> According to the ESA, critical habitat is defined as “specific areas within the geographical area occupied by the species . . . [and] outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.”<sup>37</sup> The proposed changes alter two facets of that definition. First, the changes would require administration to initially evaluate only the areas that the species in question *currently* inhabits.<sup>38</sup> Second, the potential critical habitats currently uninhabited by the species would have to be proven to provide “substantial benefits” to the conservation of the species to be included.<sup>39</sup> This will make

---

<sup>34</sup> *Id.* (Explaining that the framework for foreseeable might be subject to individual or political bias by stating that “[c]limate change projections showed significant impacts to the species’ habitats, but opponents claimed the projections were not reliable enough for ESA determinations. Since many species could be affected by environmental changes, the question of whether or not climate change is considered “the foreseeable future” could impact future listing decisions.”).

<sup>35</sup> *Listing a Species as a Threatened or Endangered Species*, *supra* note 21, at 1.

<sup>36</sup> Jarman, *supra* note 28.

<sup>37</sup> 16 U.S.C. § 1532(5)(A).

<sup>38</sup> Perkins Coie, *Major Changes Proposed to Endangered Species Act Regulations*, JD SUPRA (July 23, 2018), <https://www.jdsupra.com/legalnews/major-changes-proposed-to-endangered-94355/>.

<sup>39</sup> Jarman, *supra* note 28.

it difficult to provide habitats for species that may have been forced out of their native habitats due to the various factors that the ESA is supposed to protect against.<sup>40</sup>

An additional rollback that creates yet another hurdle for species to be listed is a proposal that would allow states to determine whether species are threatened or endangered.<sup>41</sup> While this initially may seem like an expansion on the range of species listings, the state and local governments will not have access to the federal scientific research reports available to the FWS and NMFS due to lack of funding.<sup>42</sup> Further, the state data may also not be representative of the species information as a whole.<sup>43</sup> While this may encourage cooperation between federal and state and local governments, it may also prevent the most accurate species information from being used in determination of the species listing and make it more difficult for species in need to be listed.<sup>44</sup> According to section 4, “[t]he Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him.”<sup>45</sup> Thus, only the information available to the Secretary can be used to make species determinations, even if it is not the most accurate information.

Although there are several other changes being proposed as well, such as removing the Gray Wolf from the list<sup>46</sup> and placing attorney fee stipulations in place that will make it more difficult for individuals to sue on behalf of ESA,<sup>47</sup> the next proposal discussed is potentially the most significant.

---

<sup>40</sup> *Id.*

<sup>41</sup> See H.R. Rep No. 115-561 (2018).

<sup>42</sup> Phippen, *supra* note 1.

<sup>43</sup> See *id.*

<sup>44</sup> *Bills to Modernize Endangered Species Act Advance Through Committee*, HOUSE COMMITTEE ON NAT. RESOURCES (Oct. 4, 2017), <https://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=403024>.

<sup>45</sup> 16 U.S.C. § 1533(b)(1).

<sup>46</sup> See H.R. Rep No. 115-487 (2017).

<sup>47</sup> See H.R. Rep No. 115-563 (2018).

## V. ECONOMIC IMPACTS ON DETERMINING CLASSIFICATION OF SPECIES

The current administration is proposing changes to the process of determining the classification of species as threatened or endangered. Currently under the ESA, the determination of species classification is as follows:

The Secretary shall make determinations required by subsection (a)(1) *solely on the basis of the best scientific and commercial data available* to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species . . .<sup>48</sup>

The key here is that determination is based “solely” on scientific and commercial data. This is further specified in the Code of Federal Regulations, which specifies that the determination is based on the data collected “without reference to possible economic or other impacts of such determination.”<sup>49</sup> While the current determination of listed species does not allow for the consideration of economic factors, the current administration plans to completely reverse that provision.<sup>50</sup>

This amendment would not simply allow calculations of cost analysis to factor into the determination of species listings, but it would actually require the review of these costs in each species listing decision.<sup>51</sup> It would also allow the FWS and NMFS to “decline to list the species as a result of those economic impacts.”<sup>52</sup> Although both the FWS and NMFS say they will not use the cost benefit analysis in their determinations of species listings,<sup>53</sup> the language change in the act itself will certainly make it more difficult to get species listed.

---

<sup>48</sup> 16 U.S.C. § 1533(b)(1)(A) (emphasis added).

<sup>49</sup> 50 C.F.R. 424.11b (2018).

<sup>50</sup> Fears, *supra* note 6.

<sup>51</sup> H.R. Rep No. 115-560, at 2 (2018).

<sup>52</sup> *Id.*

<sup>53</sup> Jarman, *supra* note 28.

The proposal states, “[s]pecies listings, however, impact our national economy and can restrict the ability of State and local entities to provide for the public health and safety.”<sup>54</sup> The proposal also states that the listing of species can hinder the development of land, so the cost of this development should be factored into the consideration of the species listing.<sup>55</sup> However, the purpose of the ESA is to protect animals from the destruction of habitat, not to compare this goal with the possible generated income of the developed land.<sup>56</sup> If this were the case, then the species would almost always come second because the income created from developing land will nearly always be greater than the income created from saving a species.

Practically, it is impossible to place a monetary value on the worth of preventing extinction of a species. Thus, the cost of providing habitat and protection for a threatened or endangered species would always prove to cost more than the species’ determined monetary “worth.” That is not a practical statistical analysis, and the proposal does not provide any sort of feasible way of calculating this cost comparison.<sup>57</sup>

In addition, this proposal contradicts how the U.S. Supreme Court has ruled in favor of endangered and threatened species in the past when land development was taking place.<sup>58</sup> In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>59</sup> the plaintiffs sued the Secretary of the Interior in federal court, saying that the FWS had interpreted the word “harm” under the ESA too broadly and negatively impacted their business.<sup>60</sup> The current interpretation prevented the business from building homes that would bring in substantial income to boost the

---

<sup>54</sup> H.R. Rep No. 115-560, at 1 (2018).

<sup>55</sup> *Id.*

<sup>56</sup> *Listing a Species as a Threatened or Endangered Species*, *supra* note 21, at 1.

<sup>57</sup> See H.R. Rep No. 115-560 (2018).

<sup>58</sup> See e.g. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687 (1995). See also *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

<sup>59</sup> 515 U.S. 687 (1995).

<sup>60</sup> See *Babbitt*, 515 U.S. at 692.

community's economy because the development interfered with the habitats of the Northern Spotted Owl and Red-Cockaded Woodpecker, even though there was no evidence of directly resulting harm.<sup>61</sup> The Supreme Court ruled in favor of the FWS, saying that harm to threatened and endangered species also encompasses destruction of those species' habitat.<sup>62</sup> They did not take the economic factors of the land development into account.<sup>63</sup>

In another U.S. Supreme Court case, *Tennessee Valley Authority v. Hill*,<sup>64</sup> the Tellico Dam project was halted because the recently listed Snail Darter was found in the water that would be affected by the dam.<sup>65</sup> The court ultimately concluded that construction could not continue because it would jeopardize the existence of the species.<sup>66</sup> In that decision, the court ruled that the value of endangered species is "incalculable."<sup>67</sup>

The newly proposed requirement of cost-benefit analysis clearly bypasses one of the ESA's crucial goals.<sup>68</sup> Congress passed the ESA, with the recognition "that our rich natural heritage is of 'esthetic, ecological, educational, recreational, and scientific value to our Nation and its people.'"<sup>69</sup> This goal in and of itself demonstrates the intrinsic importance of the land and wildlife that comprise and bring value to our nation.

---

<sup>61</sup> *Id.* at 696-698.

<sup>62</sup> *Id.* at 708.

<sup>63</sup> *Id.*

<sup>64</sup> 437 U.S. 153 (1978).

<sup>65</sup> *Tenn. Valley Auth.*, 437 U.S. at 162.

<sup>66</sup> *Id.* at 173 (Stating that the no jeopardy language of the act "admits of no exception," and "[t]o sustain that position, however, we would be forced to ignore the ordinary meaning of plain language. It has not been shown, for example, how TVA can close the gates of the Tellico Dam without "carrying out" an action that has been "authorized" and "funded" by a federal agency. Nor can we understand how such action will "insure" that the snail darter's habitat is not disrupted.").

<sup>67</sup> *Id.* at 178.

<sup>68</sup> Kristoffer Whitney, *Critics of the Endangered Species Act are Right About What it Does. But they Miss the Point.* WASH. POST (Aug. 2, 2018), [https://www.washingtonpost.com/news/made-by-history/wp/2018/08/02/critics-of-the-endangered-species-act-are-right-about-what-it-does-but-they-miss-the-point/?noredirect=on&utm\\_term=.84a317aef453](https://www.washingtonpost.com/news/made-by-history/wp/2018/08/02/critics-of-the-endangered-species-act-are-right-about-what-it-does-but-they-miss-the-point/?noredirect=on&utm_term=.84a317aef453).

<sup>69</sup> *Endangered Species Act: Overview*, *supra* note 10.

## VI. CONCLUSION

As stated by a former president of the FWS, Jamie Rappaport Clark, “Unfortunately, the sweeping changes being proposed by the Trump administration include provisions that would undercut the effectiveness of the ESA and put species at risk of extinction....The signal being sent by the Trump administration is clear: Protecting America’s wildlife and wild lands is simply not on their agenda.”<sup>70</sup> With such extensive proposals set out to weaken the act that affords great protection for our ecosystem, the resulting consequences will be catastrophic. If our country continues to develop at the expense of the flora, fauna, and wildlife surrounding us, we are destroying biodiversity that has immeasurable intrinsic value.

According to the director of government affairs at the Center for Biological Diversity, Brett Hartl, “If these [proposed] regulations had been in place in the 1970s, the bald eagle and the gray whale would be extinct today.”<sup>71</sup> There is no monetary value that can be placed on the worth of a species; the preservation of each species has been rendered priceless by courts in the past.<sup>72</sup> By the time we truly realize the impact each species has on our ecosystem, it will be too late to preserve them.

Although the threat of these changes is ominous, they have not yet been enacted into law.<sup>73</sup> With all of the opposing feedback from scientists, biologists, experts, and the general public, the Trump administration might be forced to scale back on these drastic changes in order to gain support,<sup>74</sup> or might be required to heed the public comments of experts and abandon its proposed changes to the ESA completely.

---

<sup>70</sup> Fears, *supra* note 6.

<sup>71</sup> *Id.*

<sup>72</sup> *Tenn. Valley Auth.*, 437 U.S. at 178.

<sup>73</sup> Phippen, *supra* note 1.

<sup>74</sup> *Scientists Voice Opposition to Changes in US Endangered Species Act*, *supra* note 5.