DIALOGUE

2019 Endangered Species Act Regulatory Revisions

Summary

The U.S. Department of the Interior and National Oceanic and Atmospheric Administration recently finalized comprehensive changes in how the Endangered Species Act (ESA) is implemented. These changes address the species listing process, critical habitat designations, protections for threatened species, and the §7 consultation process. On August 23, 2019, the Environmental Law Institute hosted an expert panel that highlighted reactions to the changes and explored how they will be implemented, whom they will affect, their impact on state and local agencies, and how they will impact species conservation. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Hannah Keating is Manager of Educational Programs at the Environmental Law Institute.

Ya-Wei (Jake) Li (moderator) is Director for Biodiversity at the Environmental Policy Innovation Center.

Ramona McGee is a Staff Attorney at the Southern Environmental Law Center.

Peg Romanik is the Associate Solicitor, Division of Parks and Wildlife, in the Office of the Solicitor of the U.S. Department of the Interior.

Anna Seidman is Director of Legal Advocacy and International Affairs at Safari Club International.

Greg Sheehan is Vice President of Asset Management at Blue Diamond Capital and former Principal Deputy Director at the U.S. Fish and Wildlife Service.

Jonathan Wood is a Research Fellow at the Property and Environment Research Center and a Senior Attorney at Pacific Legal Foundation.

Hannah Keating: On August 12, the U.S. Department of the Interior (DOI) and the National Oceanic and Atmospheric Administration (NOAA) finalized regulatory changes to how the Endangered Species Act (ESA)[1] is implemented.[2] While other changes have been made in recent years to ESA regulations,[3] these new changes are the most significant in more than two decades.

I would like to take a moment to introduce our outstanding moderator. Jake Li is the director for biodiversity at the Environmental Policy Innovation Center. Previously, he represented regulatory industries as an environmental lawyer, and then grew the endangered species policy program at Defenders of Wildlife. After a decade that spans both sides of the table, he is now largely focused on engaging the public and private sectors in saving endangered species.

Jake Li: I'm delighted to be a part of this expert panel. We will present a wide range of perspectives on the ESA revisions. I think that wide-range perspective is especially important because most of the news coverage that I've seen on the regulations has focused on just a few of the controversial changes while overlooking the other more complex, but probably equally important, changes. Even for the handful of really controversial changes, you'll hear both sides of the story today, which we hope will give you a more informed basis to think about the implications of these policies.

Before we turn to our first panelist, I want to spend a few minutes providing an overview of the regulations and my own assessment of them so that you can familiarize yourself with what the rest of the speakers will talk about.

At the highest level, the regulatory changes addressed three parts of the ESA. The first is that we have rules that tailor protections for species listed as threatened. We call

1. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
2. Press Release, Trump Administration Improves the Implementing Regulations of the Endangered Species Act (Aug. 12, 2019).
3. *See* Environmental Law Institute, *Breaking News: Proposed USFWS Endangered Species Act Regulations*, July 31, 2018, https://www.eli.org/events/breaking-news-proposed-usfws-endangered-species-act-regulations.

these 4(d) rules. The second is that we have rules that determine how a species gets listed under the ESA and how critical habitat is designated for a listed species. Most of the news coverage I've seen has focused on these two categories of changes. But a third category of change, namely the rules for the §7 consultation process, has actually received fairly limited coverage to date. Part of the reason is that the §7 regulations are a lot more complex to understand and they don't necessarily affect the general public as much, but they're really important to ESA practitioners. So, we're going to also provide an overview of the §7 changes.

Among these three parts of the ESA, my organization has identified 33 discrete revisions. I categorized every one of those 33 changes according to two criteria. The first one is its likely effect on conservation. The second one is how much it actually changes ESA practice compared to the past. Based on these criteria, I divided the 33 changes into four categories.

I found roughly six changes for which the effects of conservation will probably depend on how the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (together, the Services) implement those regulations, and, in particular, how the agencies exercise their broad discretion when it comes to each of those regulatory changes.

The second category is changes that would have a negligible effect on conservation. Most of these changes make no or only minor alterations to current ESA practice, and there probably hasn't been much talk in the news about them.

The third category is changes that, in my view, will likely make it harder to conserve species. That third category is probably the ones that you've seen in the *New York Times*, *Washington Post*, and a lot of other news outlets.

The fourth category of changes might make minor improvements to conservation—for example, by increasing the efficiency of the ESA process, which leaves more time for FWS biologists to do the other work of recovering species. If you want to see an analysis of each of these changes, you're welcome to visit my webpage.[4]

I'd like to briefly touch on the changes to each of the three regulations. The first one is that for all threatened species listed by FWS in the future, the agency will no longer automatically offer the species the full protections of §9 under the ESA. Rather, the §9 protections will need to be specified on a species-by-species basis in a rule called the 4(d) rule. This withdrawal has been really controversial because the question is, will FWS now have to go out of its way to write rules to protect the species when, previously, the species automatically got the §9 protections?

With all of that said, I think it's important to have some context when you think about these 4(d) rules because for half of all the threatened animal species that FWS has listed, it has not extended the full protections of §9. Rather, the agency has issued 4(d) rules that exempt various human activities. If you break down 4(d) rules by year, you'll see that even under the Barack Obama Administration, just over 50% of all the animal species listed as threatened had a 4(d) rule.

Thus, the alteration of protections for threatened species is not new. It's been a long-standing practice dating all the way back to the 1970s. But that's an unappreciated fact in many instances. I think, moving forward, one of the key questions will be which species will FWS protect using a species-specific 4(d) rule? Another question is what human activities will these rules regulate versus what will be exempt?

The last big question is how long will it take the Agency to publish these rules? If there's a big gap in the publication of the rules after a species is listed, that gap represents a period for which there's no §9 protection for the species. Of course, the §7 protections would still apply. But the §9 protections are usually what triggers things like habitat conservation plans and other types of §10 agreements.

Next, I'd like to touch on the changes to the standards for listing species. There are three notable changes that I've seen. The first is the change to the definition of "foreseeable future," which is used to determine whether a species qualifies as threatened under the ESA. Previously, the foreseeable future extended only as far as the agencies can predict that the future is "reliable."

Now, the standard is "likely," which the agencies define as "more likely than not." So, I think the question is how does "likely" differ from "reliable" in practice? In the background to the new regulations, the agencies say that there won't really be much of a change in practice. I think that remains to be seen.

Second, there is now an option for the agencies to present data on the economic and other impacts of listing a species. This is optional and the data cannot be used to influence the listing decision, but it could be published and made available to the public concurrent with the listing decision. This has caused a lot of concern among the conservation community. Third is a clarification that the standards for listing and delisting are identical. So that covers listings.

Let me touch on two changes to the critical habitat process that I think are noteworthy. The first one is that the agencies will now have broader discretion to decide when not to designate critical habitat because doing so would be "not prudent." For context, in the past two decades, FWS has made about 21 not-prudent determinations for domestic listed species. And the reasons are sort of all over the place. There could be the threat from illegal collection. In many other instances, the species was actually likely extinct. Then more recently, there was a decision not to designate critical habitat for a bumblebee because habitat was not a limiting factor for that species. So, I think it will be interesting to see whether there's going to be an uptick in not-prudent determinations under the regulatory changes.

4. *See* Environmental Policy Innovation Center, *A Guide to the Revised Endangered Species Regulations*, http://policyinnovation.org/esaregs19 (last visited Sept. 23, 2019).

The second and final change around critical habitat I want to identify is that there will be a narrower basis for designating habitat that's not currently occupied by a species. There are three reasons I think it will be narrower, including some new requirements around what constitutes unoccupied critical habitat. For context, since 2008, FWS has designated very little unoccupied habitat. I think this is important context because unoccupied habitat hasn't been a big part of critical habitat designations to begin with. So you can interpret the narrowing of the standards for unoccupied habitat with this in mind.

Finally, well over one-half of the 33 changes I identified pertain to the §7 regulations. Some of the notable changes include how to describe the effects of a federal action on species as well as a new deadline for the Services to decide whether to concur with a federal agency's request for concurrence as part of informal consultation. I think a number of these changes are fairly important for §7 practitioners.

There are also three changes that may improve efficiency and collaboration in the §7 process. I think these are good because efficiency means more time for FWS biologists to do more things that are needed for recovery. Finally, over 10 of the changes just clarify current practice, so they don't really result in significant changes to the day-to-day practice of §7.

That's my quick overview. Now, I'd like to turn it over to our five panelists, starting with Peg Romanik who is the associate solicitor at DOI.

Peg Romanik: I head up the Division of Parks and Wildlife in DOI's Office of the Solicitor. And I am the head career attorney for both FWS and the National Park Service. I have been working for over 35 years at DOI, and most of that has been in the world of endangered species. So, I come to this with lots and lots of experience in many administrations. I have worked on various iterations of rewriting regulations. Each administration comes in with ideas and pulls people together to think about it. This Administration had a slightly different way of looking at it. But from a career employee point of view, we were very engaged right from the beginning.

The way this process started is that the then-deputy secretary met with me and Gary Frazer, who is the assistant director for FWS on endangered species, and asked us who knows endangered species stuff, who should I be talking to and getting together at the National Conservation Training Center (NCTC). Let's get a group of people handpicked by us—not by politicals—who can really talk to me about what they're interested in with regard to several sections of the ESA. Ultimately these regulations focused on §4 and §7, but, if my memory serves me right, we may have talked about §6 and §10 as well.

Attorneys who work on these issues and practitioners in both NMFS and FWS met at NCTC for facilitated discussions, describing what they would like to change or what they have a problem with. Policy people were there as well from the U.S. Department of Commerce, NMFS, and DOI. After that meeting, decisions were made about where we'd go forward, and so a decision was made to go forward with §4(d), as Jake just said, and §7. For §4(d), that only affects FWS because, not highlighted very much in some of the news coverage, NMFS has been operating under a 4(d) rule, doing it the way we now propose to do, for 40 years. They had the same process. They never had a blanket rule. With each species they have to look at, they apply §4(d).

A writing team consisting of listing people was formed that worked on §4 regulations. The teams included biologists from FWS and NMFS, attorneys from FWS, and attorneys from NOAA who do that work. There was also the §7 team. My background is §7, it's my area of expertise.

We worked on these rules as a team. The way the process worked was we formulated some ideas where we wanted to go and, at least I can only speak for DOI, we had extremely easy access to politicals. We could just go and say, okay, here's a list; we need some policy determinations now of where you want to go. Gary, myself, and others were included in those conversations, so then we'd go back to the team and say, okay, here's where we go. And the team would work from the proposal. We worked on, proposed, and discussed all the various things we wanted to talk about from a practitioner's point of view—both as the conservation biologists who were in the room and as the ESA attorneys who were in the room.

After the proposed rule went out, we got a lot of comments. I also do some other work when I'm not eating, breathing, and living the ESA. Somebody will talk about a regulation getting a thousand comments and I'm like, oh, that must be nice. But, we got a ton of comments. The career teams went over those comments. Obviously, when you have that many comments, we don't read each individual one, but they were batched, and we read them. All individual-type comments were pooled together and put into an Excel spreadsheet. The team first worked them through and looked at them and said, okay, this person just doesn't understand, and we could just answer that.

We looked at all the various things contained in the comments. Again, for some of them, the answer was that they just don't know what they're talking about. They're wrong; this is not what this regulation is even proposing. We can easily respond to that kind of comment. Some of them we need to talk to more lawyers about things. The responses to these comments involve more of a legal call. Then, some of them we realized we're going to need policy input to find out where this Administration wants to go. So, the comments were moved into that group. We would meet with the various policy people from time to time. We would get direction and go back to the team. That was the procedure through the entire process.

The teams were interesting. I told many people that the §7 team I worked on was the best team situation I've ever worked on. It was people who knew what they were doing. Very collegial people that came from all different areas.

A lot of their issues, as you could guess, are West Coast issues, and so the issues could be very different. Whale issues are quite different than the Franklin's bumblebee-type issues. And there were attorneys who came from all different aspects. We worked through and eventually came up with the final rule. And again, there was a whole lot of career input as well on these teams.

Eventually, we came up with these three rules. I like how you have described how various provisions of the rules could fall in different categories, Jake, but I don't necessarily agree with some of your conclusions about where they fall in each category. But I like how you put it into those various categories.

Certainly, some of them I can see from a policy point of view where you might call them minor. For us, those are really important as a practitioner. An example is "but for" now being regulatory language as the causation standard when you look at an action under §7. This is something that, while it appears small on its face, is important for the efficiency of the ESA because we have argued about it with action agencies for 30 years. That argument is over now because we have in the regulatory text that the appropriate standard is "but for." Before, it was just hidden in an unusual part of the handbook. There were some narrow quotes in the preamble to the 1986 regulations.

So, while that can appear small, it's important and really relates to the efficiency of how we do §7, and therefore relates to the efficiency of the ESA. So, perhaps for some of these revisions, while I don't know what are in the 10 categories, many of those from our point of view will have less conflict. It will get things to move more efficiently, and more broadly speaking, help implement the ESA in a manner that works better. Therefore, from our point of view, from a career employee's point of view, it implements ESA in a better manner.

I'm going to talk briefly about each of the regulations. Jake gave an overview, but §4(d) for us, I think, is one of the most important determinations. The statute clearly allows us to do 4(d). As I've said, NMFS has been doing it for 40 years.

But here is the advantage of doing a 4(d) rule. There's a lot of conflict in the ESA. That's just the reality we've got. A lot of people think it overreaches. A lot of people worry about how it impacts private land. And 4(d) rules can really help us take some of the angst out of listing. So, for example, you might have a species that has the occasional take for agricultural practices. But that's not the threat. Those kinds of takes do not have an overall impact on the species in a way that makes a difference with regard to recovery and survival.

So, through a 4(d) rule, you could now tailor a rule that says agricultural practices are exempt. It's not a prohibited take. And that just saves a lot of time and money on habitat conservation plans or consultations you don't need. It saves angst and anger about the ESA. It makes it a better act. It helps promote conservation because it makes it more commonsense. People reading those 4(d) rules can say, oh, the services actually thought about where they really need the protections and where they don't.

So, with regard to revisions to the §4 regulations—the changes Jake talked about in the definition of "foreseeable future"—I know the press has talked a lot about the changes meaning that we won't look at climate change. It's just not true. Climate change will still be looked at, but it has a standard and it has to be a reasonable determination. If it isn't a reasonable determination, I think you violate the Administrative Procedure Act. I think it's important that those words are used in the regulatory framework.

It also talks about streamlining factors for delisting. This was very important to a lot of people because we were tired of hearing that it was a different standard for delisting. And if you read the preamble, there's a lot of discussion about these issues. I can't emphasize enough how important it is to read the preamble. There is a lot of meat there. The writing teams worked really, really hard to include our thought processes and how we got to certain places.

Clearly, the most controversial part of this rule has been the notion of looking at economics. I happened to come across a *New York Times* article[5] that said the government will now consider economic factors before categorizing a species as endangered or threatened. That was a surprise to me. That is not at all what these regulations had intended by taking out the sentence on economic considerations of listing. Taking away that sentence in the regulations was largely so that if this Administration or any other administration wants to look at the economic impact from listing, that sentence could not be held against them.

And I reread the preamble to the §4 regulation last night many, many times over—there was a discussion about how it is clear from both congressional history and the plain wording of the Act that the listing has to be based solely on science-based decisions. Economics cannot come into play. So, whether this Administration or any other administration looks at the economics, they're going to have to have a really great administrative record that demonstrates economic factors did not come into play with regard to the listing decision itself.

With respect to the revisions to the §7 regulations, we did a couple of things. In defining the "effects of an action," we included the "but for" standard and gave some guidance as to what "reasonably certain to occur" means. We have argued with action agencies for 30 years on what reasonably certain to occur means, and there was just no guidance as to what that standard meant. So it was really important for us to describe some of the factors you look at with regard to reasonably certain to occur in these regulations.

We also added the word "whole" to the definition of "destruction or adverse modification" to indicate that we looked at whether the impact will affect the ability of the critical habitat designation as a whole to provide for the

5. Lisa Friedman, *US Significantly Weakens Endangered Species Act*, N.Y. Times, Aug. 12, 2019.

conservation of the species, which is how we have always looked at it. The adverse modification analysis is much like how we make our jeopardy determinations—we look at the effects to the species as it is listed. The 2016 regulations[6] that came out with regard to the definition of destruction or adverse modification also said in the preamble that you look at the effects to the critical habitat designation as a whole. It's just that this time we added it to the regulatory definition itself.

As to some of the other issues we looked at in developing the §7 regulations, a lot of the action agencies wanted a time frame for completing informal consultation (60 days). I think FWS and NMFS have shown that the vast majority of consultations make it well within that time frame now. But to some of the action agencies, that was important to them. We got a lot of comments on that, so we worked that in.

Other things with the §7 regulations that I think will help the consultation process and therefore help the ESA are how we talk about programmatic consultations and how we talk about conservation measures, how those play into a §7 consultation. And those were brought to the table largely by people who had been impacted in the consultation process and found it frustrating that the process could be held up because it was unclear how these concepts worked in a consultation. We couldn't move forward because we didn't have enough guidance in those areas.

Jake Li: Thanks, Peg. I appreciate the context around who worked on the regulations and the fact that there was significant career staff involvement. That's not a story that is widely told, so I think that's good to know.

Next, we have Greg Sheehan, who was the former principal deputy director of FWS. He is now the vice president of asset management at Blue Diamond Capital.

Greg Sheehan: I'd like to take a few minutes and cover governmental processes and how I perceive them, and also touch on my perception of the changes to the major ESA regulations.

My background in the wildlife profession includes 25 years at Utah Division of Wildlife Resources, where in the past five years I served as the state director. I was then honored to serve as the principal deputy director of FWS during 2017 and 2018. In Utah, I was involved for many years working closely with FWS on such species as the Utah prairie dog, desert tortoise, and many desert fish species and others that were listed or candidates for listing. Collectively, we had many successes, but at times had disagreement upon strategies for protections or recovery efforts. Nevertheless, we always worked together to achieve strong conservation outcomes.

I believe strongly in our form of government wherein the legislative branch creates our laws and the executive branch is asked to implement those laws. Rulemaking authority is often granted to those executive branch agencies with the expectation that they will employ public processes as they contemplate those rules. I do believe strongly in these processes and the rule of law.

In the past 25 years, I've attended hundreds of public meetings to discuss rulemaking related to wildlife management. Those opportunities for public input, whether oral or written, helped to provide clarity and perspective for those who ultimately are responsible to implement wildlife law and policy. Those rules or administrative laws were promulgated with smart people using the best information they had at the time.

As the years go by, we often find a variety of factors that bring about the need to revisit those rules. Those factors that could lead to changing the rules may include judicial interpretations, changing conditions that affect a specific program or wildlife population, or new information or technology that allows us to better understand conditions thus leading to changes. FWS has rulemaking authority to administer the ESA dating back to 1973, and even further back with certain laws and protections that existed prior to the ESA.

In the 1970s and 1980s, we saw changes to the law and the rules that allowed the management actions that were viewed as the most appropriate at the time. The ESA has been among the greatest conservation tools ever crafted as it recovered many of our iconic species, including eagles, falcons, and others. As the conditions around us change, we must continue to review and fine tune, as needed, the ESA rules.

Last year, I was able to announce and describe the draft changes to the ESA rules. Comments were then taken over many months and those comments were distilled down and ultimately used to inform the final changes to the ESA regulations that were announced last week. I've read the summation of comments and believe that FWS fairly and appropriately considered those comments and made many modifications based on them. It is a process that works and the voice of the people was listened to.

As with most public discussions on wildlife management and conservation strategies, there are seldom people or groups that believe they got everything the way they wanted or wish to see it delivered. In other words, there are many perspectives of what these rules should ultimately look like. But a public process works, and it's still the best in the world. Our most sensitive species in the country will still have protections that will allow them to persist into the future.

Now, I'll share my thoughts on a few of the regulation changes. I want to applaud Gary Frazer and the outstanding team at FWS as well as NMFS and the Solicitor's Office that worked on these regulation changes. I was able to attend the two-day kickoff meeting at the NCTC where we brought together many people within FWS, NMFS, the

6. Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7214 (Feb. 11, 2016).

Solicitor's Office, and DOI as we discussed what changes might make sense. These professionals contemplated what is working and what may need to be modified in the regulations as were written. Excellent comments came out of that process and have now ultimately led to the revision of these regulations.

First, I'll look at the delisting of a species. There are thousands of wildlife professional managers outside of FWS or largely within state and wildlife agencies in addition to FWS who work on threatened or endangered species and strive toward their protection and recovery. These professionals have a deep passion for the protection of these species that have imminent threats facing them. It's quite often frustrating to local governments, state wildlife agencies, and private landowners, among others, when a species has had millions of dollars and significant man-hours applied to fulfilling the stated recovery efforts, yet after recovery objectives are achieved, the species are still not delisted.

Or those recovery targets continue to be modified to a point where it seems impossible to achieve the delisting of a species. When this occurs, it does not incentivize state and local governments to direct more resources to recovery efforts. That frustrates the public until they believe the ESA truly is a one-way street and once listed, there's no clear pathway for delisting. A huge start in this process is clarifying the criteria and the regulations for delisting a species so that they mirror the criteria for listing a species. Some believe that this was already self-evident in the regulations, but at times the approaches taken in the field did not demonstrate that.

Regarding critical habitat, one of the most contentious issues that surrounds listing of a species is often not the merits of listing a species but, in fact, the designation of critical habitat. I've been involved in discussions both at the state level and FWS regarding the designation of critical habitat. Those determinations certainly are prudent in the recovery of the species. But designating large swaths of unoccupied areas in hopes that recovery may happen there one day again brings frustration to state and local governments.

Landowners, water users, and others are impacted by planned recovery efforts. Please do not misunderstand me. I do believe that we must often identify unoccupied areas for our recovery planning. But when those areas become so vast and speculative in nature, we do not strengthen the cause for the ESA itself, but create naysayers to an act that has been so instrumental in creating protections and recovery for species for more than four decades.

When I began my comments, I said that I'm a firm believer in the rule of law and the processes that we follow and the governance of our people in this great nation. I believe that whether or not we agree with laws that are formulated by elected officials, they must be complied with. So, just as there is a process to craft and pass a law or an act, there's the same process to change, reverse, or eliminate that law. When the ESA was created, there was by intention a tiered structure that provided a hierarchy of protection to the species that qualified for protections, and that law should have rules implemented that reflect the spirit and intent of the law via the separation of protections between threatened or endangered.

In the mid-1980s, FWS promulgated rules that effectively undid certain provisions of the ESA by creating protections for species that were listed as threatened and treating them as endangered. The clarifications made in these new changes to the regulations ensure that the spirit of the law as written will be carried out and that the most important protections will still exist for the species with the greatest risks, just as the U.S. Congress intended. Should people believe that the law is inadequate, then that law needs to be modified rather than expecting that an agency or regulatory fix is a solution to changing the law.

Requiring a 4(d) rule for threatened species is the right approach, as the approach FWS has taken in many cases in recent years, and that NMFS has always taken. A recent example when I was a part of FWS was the threatened listing of the Louisiana pine snake. That was listed concurrently with the 4(d) rule last year. This process, as I said, is the correct process and the new regulations will ensure that. I want to reaffirm that these changes are largely developed by a broad base of FWS and NMFS employees who have years of experience in the administration of the ESA.

Jake Li: Greg, thanks for this perspective from federal and state leadership levels. The historical context and your observations about the inner workings of how these regulations were developed is really useful knowledge. Next, I'd like to turn it over to Ramona McGee from the Southern Environmental Law Center.

Ramona McGee: As an attorney with an environmental nonprofit representing clients across the Southeast, I'm really looking at these regulations from a different perspective. I'm looking at these with an eye toward how they will impact my clients' interests and efforts to conserve the special ecosystems in the Southeast. I think it's really important when we're talking about these regulations to consider the context of where they're coming from and when they're coming, which is that there could be an issue by an administration with the deregulatory agenda.

This is not the first attack on our environmental bedrock laws. This is coming on the heels of attacks on clean water, clean air, and countless different measures and steps that have been taken by this Administration to show that it is hostile to the environment and hostile to science. I give that as context because I think that's really going to influence how the regulations are implemented, and we have to think about them in that context.

Keeping that background and context in mind, I think it's helpful to give a little ESA background as well. Then, I'll start walking through some of these different changes, the concerns that I have with them, and what I see bearing

out in terms of conservation efforts and legal impacts as these changes are applied.

First, I'll talk a little bit about the overarching goals of the ESA. The U.S. Supreme Court explained that "the plain intent of Congress" in passing the ESA "was to halt and reverse the trend toward species extinction, whatever the cost."[7] The Court went on to say that the Act represents the institutionalization of caution. In other words, the species that are being considered under this act should be given the benefit of the doubt. Not the other way around.

It's an institutionalization of the precautionary principle, which basically is about erring toward the less risky option when you're looking toward a particular action or a particular decision. In order to achieve those conservation policies and goals, the ESA is premised on sound science-based decisionmaking. We've already heard today about how the agencies are repeatedly directed to use the best available science under the statute. That's something that permeates throughout the statute and analyses under the ESA. These regulatory changes really upend that scheme and that foundation for the ESA because they really undo a lot of the efforts to rely on science and a lot of those conservation benefits of the species approach.

So, turning to the blanket 4(d) rule, this has been covered a fair bit already, but I have a few other thoughts on it to add to the mix. In particular, the starting point here is that this was really that institutionalization of caution with the blanket 4(d) rule that was passed previously. This set that default level of protection for threatened species. It also removed a huge administrative burden for FWS so that it could just list a species as threatened and then not worry about the time-consuming process of finalizing and issuing a species-specific 4(d) rule.

Greg made a comment about how requiring a 4(d) rule is the appropriate approach under the ESA, and I think that that's a great point. The problem here is that these regulations do not require a species-specific 4(d) rule. In fact, FWS specifically rejected a requirement of issuing a simultaneous species-specific 4(d) rule saying that, instead, it will retain the discretion to list a species as threatened and then later determine whether and at what point to issue that species-specific 4(d) rule.

There are a lot of concerns, as I already alluded to, with the administrative backlog here. There are hundreds of species right now stalled in FWS' backlog of listing determinations. In fact, at least 42 species have gone extinct while waiting for a listing determination. That's more species than have gone extinct after being protected under the Act.

There was mention that NMFS has never had a similar blanket 4(d) rule. That's true. But NMFS has a much, much smaller universe of species that it is dealing with. FWS has around 300 species that are listed as threatened, and again that backlog of hundreds of other species that may be considered under the Act, whereas NMFS only has about 80 species that are listed as threatened. So, it's not really a fair comparison there. NMFS similarly does not have that agency backlog that will make it difficult to get through and turn out these species-specific 4(d) rules. The implication here is that the 4(d) rule is going to lead to potentially fewer species listed and fewer protections against take for threatened species as agency resources are allocated elsewhere toward dealing with the backlog and the like.

Another note on the 4(d) rule: we often talk about it as affecting those species that are being considered as threatened under the Act and that this will only be applied prospectively, so to newly listed species. It's important to remember that under the ESA, every five years the Services must conduct a species-specific status review to determine whether or not that species still warrants listing under the Act, and what level of listing. What this means is that the currently listed endangered species in five years could go up through the status review process and then be determined to be threatened, and at that point it would not receive the protections of the blanket 4(d) rule. So, this is actually wider-ranging than we even thought when first considering this regulation.

Turning to delisting and critical habitat designation limitations, again, to touch on the scope here and really clarify that these rules apply prospectively. The agencies were explicit that they won't apply to any species where proposed rules have already been put out. But again, because of that five-year status review process and that continual reevaluation of a species status under the Act, potentially this will apply to all listed species.

Additionally, it's important to remember that we are in the sixth mass extinction right now. We are going to be having more and more species that are imperiled and needing the protections of the ESA, more and more species that are going to need to be evaluated as threatened or endangered. So, these changes are really far-reaching in terms of species that are going to be impacted.

Some folks have already discussed one of the big changes here that's gotten a lot of time in the media as well. It's the change on economics and decisionmaking. It's true that the Services repeatedly said that economics will not be influencing whether or not a species is listed in the first place. They are only going to look toward the best available science as the statute directs. However, that then begs the question of why this change was needed at all. Instead, this change seems to be opening a door to a whole new process and procedure for an already burdened agency to start collecting all this economic data, to be reviewing it to some unclear end, and then presenting it in some form or another, which again is not clear.

It's also not clear what exactly is going to be evaluated under one of these economic analyses. Will it only reach the costs of species listings or will it also reach to the benefits of species listings? That's not clear from here. So, I think this is concerning from an agency burden perspective, especially as we've already discussed the new need to do species-specific 4(d) rules. I think that would be a

7. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184, 8 ELR 20513 (1978).

much better way for the agency to focus its resources than starting to do these extensive economic analyses. But then again, why do those in the first place? What is the purpose for those? It seems very likely that having that information available and publishing that for the public is just going to allow for extensive lobbying efforts against species listings.

There's also a question about how exactly the agency is going to implement this and how it's not going to pay attention to economics even as it's collecting all the data. I think it's easy to say that we will continue to make our decisions based on the best available science, but it's really hard to think through how to do that when at the same time the agency is going to be collecting all this economic information and somehow put blinders on that information.

Turning to the foreseeable future: the context here, just to flesh that out a little bit, is that the current definition of "threatened" under the ESA applies to any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. There were some changes from the first rule, but, as Jake noted, the ultimate change here is toward a definition depending on effects being "likely."

There's a little bit of debate here about whether or not that is going to limit considerations about climate change. I think there's a pretty strong argument that this could potentially limit how climate change is considered in these different analyses. The previous standard was much more scientific in nature. Harkening back to when I started these remarks about how this is really an act premised on science and giving benefit of the doubt to the species, why then are we moving toward a less scientific definition and, in some ways, a more stringent definition of likely 4(d) effects?

When we're looking toward climate change impacts, we often are looking toward different models and predictions that may not be able to say that a certain effect is likely but more that it's possible. Under this new regulation, it's not clear how those impacts from climate change might be considered.

Another limit that comes into play on potential climate change impacts is the expansion of critical habitat exemptions. There's this notion of non-prudent determinations for critical habitat. It basically allows the agency to say, look, it's not going to make sense to designate critical habitat for particular reasons. Previously, there was a fairly exhaustive list of circumstances that would qualify, but now, the new regulation is opening the door to a non-exhaustive list of circumstances, including when threats to a species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under §7, such as melting glaciers, sea-level rise, and reduced snowpack.

This is not the correct analysis when looking at whether or not to designate critical habitat. It shouldn't be dependent upon whether or not those can be controlled by §7 consultations. So again, it seems that this is just opening the door to fewer designations and fewer listings.

One last note on the critical habitat exemption. There's also, as has been mentioned, the change about unoccupied habitat. Jake discussed how infrequently this definition has been invoked. I think that's a great point, but it's important to again consider that we are going to be seeing more and more extinctions and more and more imperiled species in the future. And a lot of those species are going to be facing threats from, again, climate change. So, you could envision a situation where right now a particular species living on the North Carolina Outer Banks might not need additional habitat, but in a few years, it is going to need additional habitat as sea-level rise inundates those marshes. This is really going to limit the ability of the agencies to proactively and preemptively prevent some of those impacts to listed species.

Finally, turning to the §7 consultation limitations, like Jake mentioned, there's a lot here. I'm going to focus on a couple pieces. This is one of those "buckets of regulatory changes." It's impacting all listed species. In that respect, this is some of the most wide-ranging changes, especially because §7 provides such a range of prohibitions on agency actions.

To flesh that out a little bit, §7 is what requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modified critical habitat. In making one of those jeopardy determinations, historically, the agencies could consider certain mitigation measures that an action agency might volunteer to implement in order to mitigate the effects of an otherwise harmful action. So that way they could reach a "no jeopardy" determination by saying, look, we're going to do all this great stuff for the species that are impacted.

Case law has been really clear in interpreting §7 that those mitigation measures must be reasonably specific and certain to occur. The agencies' changes here are pretty explicit in saying they want to undo that case law, like they disagree with that case law and want to try and fix that through this regulatory process. So, I think there's going to be some tension there and certainly some litigation figuring out whether or not that's an appropriate interpretation of §7.

But beyond that, there's a lot of concerns about allowing these indefinite mitigation measures under the new regulation, which says that the measures included in the proposed action do not require any additional demonstration of binding plans. This will allow an action agency to offer up certain management measures that it thinks it might do.

There are a lot of concerns here about the mitigation measures and how those will no longer be reasonably certain to occur and how and whether the agency will reinitiate consultation and at what point. That's a lot to cover. There's a lot more of course I would like to say about these regulatory changes, but I think some main takeaways are that these are undermining science. They're undermining the purposes of the ESA. We're likely to see fewer listings and fewer critical habitat designations and

more uncertainty, and in turn, more litigation over these different changes.

Jake Li: Thanks, Ramona. You raised a number of really good questions around how some of these regulations will be implemented and, in particular, how the agencies will exercise due discretion. I think that's a theme we might see throughout some of these presentations. Next, I'd like to turn to Anna Seidman.

Anna Seidman: I am the director of legal advocacy and international affairs with Safari Club International. I have been their lead litigation counsel for the past 20 years. I work with a team of attorneys who are involved with the ESA and wildlife law, one of whom is at the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Conference of the Parties. So we're coming at this discussion with the interest of the sustainable use community in how these rules are going to affect those who want to use wildlife.

I'm going to address various components of the rules. The first one I want to address is the clarification and application of the ESA mandate, that FWS must apply the same listing factors for both listings and delistings. This comes directly from the statutory language in 16 U.S.C. §1533(a)(1) to identify the five criteria—the risk factors as we commonly call them—for determining whether a species qualifies for either endangered or threatened listing. Nothing in the statute in (a)(1) addresses any difference between listing or delisting, and the same applies to §1533(b)(1)(a).

This section is a component of the ESA that not many people talk about; that when determining whether or not a species should be listed, FWS is obligated not just to look at the five criteria, but also to take into account those efforts, if any, being made by any state, foreign nation, or any political subdivision of a state or foreign nation to protect such species whether by predator control, protection of habitat and food supply, or other conservation practices within any area under its jurisdiction. Once again, this is another component that applies both to listings and delistings.

There is nothing in the ESA that makes any difference between what FWS must do when it's deciding whether or not a species qualifies as endangered or threatened or whether it doesn't qualify and must not be on the list. The reason it is so important that FWS clarifies that the listing and delisting criteria should be the same is demonstrated in a couple of recent cases that have shown that where there's been a lack of clarity, courts have taken it upon themselves to go further and to require more from FWS when delisting a species than when listing one.

The two cases that I'm referencing are the *Humane Society of the United States v. Zinke*,[8] which most of us recognize as the western Great Lakes wolf delisting case in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, and *Crow Indian Tribe v. United States*,[9] which is the Greater Yellowstone Ecosystem grizzly bear case. In *Humane Society*, the court invalidated the western Great Lakes wolf delisting rule because it determined that FWS didn't consider lost historic range when determining whether or not the species or the wolf population qualified for delisting. That was not a component of the five criteria or the §1533(b)(1)(a) criteria in the ESA. The court took it upon itself to add an additional burden on FWS when considering the status of the species.

In *Crow Indian Tribe*, the court imposed upon FWS a number of requirements above the five criteria and the criteria in §1533(b)(1)(a) having to do with things like genetic diversity. In both of these cases, the courts allowed or required FWS to do more for delisting than for listing. So, clarification on this point will hopefully alleviate some of these opportunities that courts have taken to create greater obligations for delisting.

The prolonged delisting of species that don't need ESA criteria for either threatened or endangered status comes with a lot of ramifications, a lot of implications. Besides the fact that keeping a species that doesn't meet the statutory criteria on the endangered or threatened species list is a violation of the ESA, it's also—as mentioned by some of the panelists—a waste of federal and state resources that could be used for the conservation of other species that do qualify for endangered or threatened status. It also discourages continued or future conservation efforts, which is something that Greg mentioned earlier.

Even the courts have recognized that keeping a species on the endangered or threatened species list beyond the point where it should be removed and beyond the point where it's recovered is a potential deterrent to conservation efforts. The D.C. Circuit said in *Humane Society* that continuing to rigidly enforce the ESA's stringent protection in the face of such success just because recovery has lagged elsewhere would discourage robust cooperation.

Basically, what the court was saying in that case is the western Great Lakes wolf had reached recovered status and was no longer essentially qualifying for endangered and/or threatened status. Just because other populations of the same species had not met that level of recovery—had not reached the status where they could be removed—doesn't mean that FWS should keep the western Great Lakes wolf on the list.

Let's talk for a moment about the blanket 4(d) rule and ending the default to the blanket 4(d) rule. A lot of people are very, very concerned that this is going to lead to all kinds of conservation problems. But the fact is that ending the default to the blanket rule recognizes that threatened

8. 865 F.3d 585 (D.C. Cir. 2017). [Editor's Note: Safari Club International, for whom Anna Seidman is Director of Legal Advocacy and International Affairs, participated in this lawsuit as defendant-intervenors in support of FWS' rules to delist the Great Lakes wolf.]

9. 343 F. Supp. 3d 999, 48 ELR 20168 (D. Mont. 2018). [Editor's Note: Safari Club International, for whom Anna Seidman is Director of Legal Advocacy and International Affairs, participated in this lawsuit as defendant-intervenors in support of FWS' rules to delist the Greater Yellowstone Ecosystem grizzly bear.]

species are not the same as endangered species and they shouldn't be treated exactly the same. That's what happened when the default was applied, that the same prohibitions applicable to endangered species would be applied to threatened species.

Every species that is listed as a threatened species should have a unique rule designed to address its specific conservation needs. Any conservationist who argues that all species should be treated the same ignores the fact that each species requires different conservation measures. Now there's been some discussion today about delay in implementing specific rules for unique species. Well, if it takes some time to do it right, then it should be done right. But basically, each species should have a rule that is directed at its specific conservation need.

FWS always has the authority and the discretion to promulgate unique rules for each species classified as threatened. And FWS has already created unique 4(d) rules for many threatened species. This is not a new opportunity. It is not a new authority. They've been using it for many years. That's been mentioned today.

But what may not have been mentioned, and I probably shouldn't mention it considering my position on some of these things, is that FWS retains the authority to apply the endangered species restrictions to individual populations of threatened species when it's required for conservation. The shift from the blanket rule doesn't take away that authority from FWS.

One of the biggest concerns heard by our community, the sustainable use community, is the question of whether 4(d) rules will lead to more authorized hunting of threatened species. Well, let's break this down between domestic and threatened species. The ESA defines conservation to include the regulated take in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved. That's a part of the statutory definition of conservation. It includes "regulated take," which other people refer to as "hunting."

The unique 4(d) rule gives FWS the opportunity to authorize hunting for a threatened species population, but only under the circumstances identified in the statutory definition of "conservation." The requirement to create individual rules for each threatened species does not modify the definition of conservation. Congress has already acknowledged that there are certain circumstances where hunting benefits conservation. If hunting provides an effective conservation tool and there are extraordinary circumstances where population pressures cannot otherwise be relieved, Congress has given FWS the authority to facilitate it for threatened species. So all the change in the 4(d) rule does, pursuant to these regulations, is give FWS the ability to consider whether hunting qualifies for the conservation of that particular species when it's creating the conservation rules for that species.

What about foreign species? Will individual 4(d) rules lead to more authorized hunting of threatened foreign species? Well, anyone who asks that question doesn't really understand international hunting. FWS doesn't regulate the hunting of foreign species listed as threatened. Hunting is authorized by the country in which the species resides. Individual 4(d) rules, therefore, can't cause a foreign species of wildlife to be hunted.

Range countries that authorize hunting will continue to do so whether or not FWS lists one of their species as threatened and/or establishes a unique 4(d) rule for that species. A 4(d) rule can benefit the conservation of foreign species by enabling importation of legally hunted members of that species into the United States and thereby facilitating financial support by U.S. hunters in range countries' conservation and management programs.

So, if an animal is going to be hunted pursuant to the regulations of the country in which that animal is found, why not make sure that the hunt brings in the greatest conservation benefit for that species via U.S. hunting participation? The question is will individual 4(d) rules that authorize importation facilitate U.S. participation in hunting conservation? That's the right question. Not whether it will cause more hunting, but whether it will facilitate U.S. participation in hunting conservation problems around the world.

Well, if you ask a number of different organizations and entities that are not hunting entities, you'll find that hunting is actually a tremendously beneficial conservation tool for the conservation of international species. For example, Save the Rhino International recognizes that since trophy hunting was permitted for white rhinos in 1968, the population of southern white rhinos increased from 1,800 to 18,000 in 2018, and black rhinos increased from 3,500 in 2004 to 5,500 in 2018.[10] Save the Rhino, in common with many conservation organizations, including the International Union for Conservation of Nature (IUCN), recognizes that the sustainable use of wildlife, including the responsible trophy hunting of rhinos, has a valid role in overall rhino conservation strategies.

CITES, where the Conference of the Parties is taking place right now, has also recognized this. It's a treaty that's been signed on by 183 countries. CITES recognizes that well-managed and sustainable trophy hunting is consistent with and contributes to species conservation as it provides both livelihood opportunities for rural communities and incentives for habitat conservation. It generates benefits that can be invested for conservation purposes.

The question is will individual 4(d) rules and authorized importation facilitate U.S. participation in hunting conservation programs around the world? Well, let's hope so because the IUCN, one of the premier scientific organizations for wildlife conservation, states that well-managed trophy hunting that takes place in many parts of the world can and does generate critically needed incentives and revenue for government, private, and community landowners to maintain and restore wildlife as a

10. Save the Rhino, *Trophy Hunting and Sustainable Use: Rhinos*, July 5, 2019, https://www.savetherhino.org/thorny-issues/trophy-hunting-and-sustainable-use-rhinos/ (last visited Sept. 27, 2019).

land use and to carry out conservation actions, including anti-poaching interventions.

It can return much-needed income, jobs, and other important economic and social benefits to indigenous and local communities where these benefits are often scarce. In many parts of the world, indigenous and local communities have themselves chosen to use trophy hunting as a strategy for conservation of their wildlife and to improve sustainable livelihoods.

The 4(d) rules give FWS the ability to use hunting and to at least consider whether hunting and importation of legally hunted animals can benefit conservation. The 4(d) rules, therefore, are tremendous incentives for conservation. We are very pleased that they're included, and we hope that FWS will take advantage of the amendment.

Jake Li: Anna, thanks for the deep dive into the listing and delisting standards and an interesting intersection between 4(d) rules and sustainable use of wildlife. I'll also add that there are a number of 4(d) rules for threatened fish species that allow for catch-and-release fishing, and that in turn may have created incentives for conservation organizations to buy easements to protect streams and other bodies of water. So there may be an indirect conservation benefit as well to some of those types of 4(d) rules. Thanks for that perspective.

Finally, our last speaker is Jonathan Wood from the Property and Environment Research Center and Pacific Legal Foundation.

Jonathan Wood: As a senior attorney at Pacific Legal Foundation, I principally represent private landowners and nonprofit groups dealing with ESA issues concerning §4 and §9, such as someone whose land has been designated as a critical habitat or is regulated by the take prohibition. In addition to litigation, I also work with the Property and Environment Research Center (PERC) to research ways to better incentivize private landowners to recover endangered species. For those reasons, my remarks are focused mostly on §4(d) and critical habitat and, to some extent, the litigation that is already underway or will very likely soon be filed concerning these rules.

To start with §4(d), eliminating the blanket 4(d) rule and moving toward a more tailored, stepwise approach holds a significant promise for improving the rate at which we recover endangered species.[11] The ESA has proven successful at preventing extinction, with 99% of protected species remaining around today.[12] I think that's actually too conservative since many of the 1% likely were extinct before they were listed.

However, the ESA has not enjoyed the same success at recovering species. Less than 3% of protected species have recovered during the ESA's first 45 years.[13] The former blanket 4(d) rule played a role in these mixed results. Consider the perspective of private landowners, the people on whom most endangered species depend for their habitat. Under the blanket rule, there was little incentive to engage in efforts to recover an endangered species on your property because you received no reward for this effort. If you succeeded and the species status was upgraded to threatened, the exact same regulations would continue to be applied to you. From your perspective, it simply doesn't matter whether a species is critically endangered or faces only remote risks.[14] As soon as a species is listed as threatened, the damage has been done. There are no more burdens to be imposed if the species continues to decline. And there's no benefit to you from reversing that skid.

Take, for instance, landowners who worked to restore habitat for the Florida manatee. When FWS ultimately acknowledged these and other efforts had recovered the species to the point that its status could be upgraded to threatened, it made clear that this good news would not lead to any relief for the property owners. An FWS spokesperson dismissed as a "misperception" that endangered species and threatened species are distinct categories.[15] "It's one classification[,]" the spokesperson told reporters, "[m]anatees will remain protected. And, indeed, the same regulations apply today as applied before these recovery efforts were undertaken.

That sends a strong signal to landowners not to expect any reward if their efforts lead to an endangered species' status being upgraded. I think that's why we have such a low success rate to recover endangered species, especially among species that depend on private land for their habitat. The incentives are just not right. Typically, from the perspective of the landowner, you have much stronger incentives to preemptively destroy habitat or to get the species to leave your property than you do to accommodate species and restore habitat.[16]

The new rule's elimination of the blanket 4(d) rule and adoption of a more tailored approach promises to correct these incentives. Going forward, private landowners' regulatory burdens will loosen as species recover and will tighten if species decline. That sends a much better signal to landowners by aligning their incentives with the interest of the species.[17]

The repeal of the blanket prohibition does not mean threatened species will go unprotected. Consultation and

11. *See generally* Jonathan Wood, The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery (2018), *available at* https://www.perc.org/2018/04/24/the-road-to-recovery/.
12. *See* Lisa Feldkamp, *What Has the Endangered Species Act Ever Done for Us? More Than You Think*, Cool Green Science (May 8, 2017), https://blog.nature.org/science/2017/05/08/what-endangered-species-act-done-effective-extinction-conservation/.
13. *See* Christian Langpap et al., *The Economics of the U.S. Endangered Species Act: A Review of Recent Developments*, 12 Rev. Envtl. Econ. & Pol'y 69 (2017). The percentage of species improving is similarly disappointing, ranging from 5% to 10% compared to 20% to 40% of species declining. *See id.* at Fig. 3.
14. *See generally* Wood, Road to Recovery, *supra* note 11.
15. *See* Patricia Sagastume, *Reclassifying Florida Manatees: From Endangered to Threatened*, Al Jazeera (Aug. 8, 2014), http://america.aljazeera.com/articles/2014/8/8/reclassifying-floridamanatees.html.
16. *See* Wood, Road to Recovery, *supra* note 11, at 14.
17. *See id.* at 14-15.

critical habitat provisions will continue to apply. But take regulation, the primary regulation of private property, will be more flexible. In some cases, take may be prohibited absolutely. In others, some forms of take may be regulated but not others, such as where landowners who contribute to an endangered species' improvement are rewarded with regulatory relief.[18] In yet others, not regulating may be the best approach if, for instance, states or conservationists are implementing their own voluntary conservation program.[19] The new rule will require FWS to consider these questions and choose the best approach for meeting the individual needs of the species.

NMFS has never had a blanket 4(d) rule, as some of the other panelists have noted. It has routinely determined that regulating take for a threatened species is unnecessary or inadvisable. FWS may similarly find that avoiding the heaviest burdens for private landowners will be in the long-term interests of species.

In fact, this approach would build on the success of the Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE Policy),[20] which encourages states and landowners to proactively work to develop conservation plans for a species in the buildup to a listing decision. Under the PECE Policy, FWS and NMFS will forego listing a species if state or private conservation efforts are likely to be implemented and successful at protecting the species. But if the agencies deem such efforts insufficient for some reason, the listing will go forward.

Although this policy has encouraged a variety of conservation efforts for candidate species, it also has its share of shortcomings.[21] First, since plans have to be developed and proven successful in the window between when a species is proposed for listing and a final decision is made, plans can be rushed and designed less well than they might be with more time. Second, the PECE Policy's all-or-nothing approach—either the effort avoids the listing or it doesn't—creates unnecessarily high stakes that can distort incentives. Finally, from the conservationists' perspective, there's the risk of backsliding. Once the agency decides not to list, will landowners continue to devote the same effort to conserving the species?

Eliminating the blanket take prohibition for threatened species encourages FWS to craft a wider variety of outcomes when states, landowners, and conservationists undertake innovative conservation efforts by incorporating PECE Policy considerations into the ESA itself rather than limiting those considerations to before a species is listed. Going forward, if such conservation efforts are promising but not quite at the level needed to avoid listing the species, FWS can list the species as threatened without regulating take, thus allowing the budding conservation effort to go forward without the burdens and conflict that would occur with stricter federal regulation.

Consider, for example, the dunes sagebrush lizard, a species that FWS determined not to list under the PECE Policy based on voluntary conservation programs developed by Texas and New Mexico.[22] Soon, however, a new threat to the species emerged—mining for frac sand—that had not been anticipated by these programs. This development started the conflict anew. Another listing petition was filed and the states are frantically working to update their plans before FWS has to decide again whether to list the species.

What if, instead, FWS had listed the species as threatened but declined to regulate take, allowing Texas' and New Mexico's plans to go forward? You wouldn't necessarily see the same conflict because the species would already be listed and the possibility that FWS might issue a take rule, which it could do at any time, would motivate those involved to continue their conservation work.

Finally, as Greg's comments suggested, the blanket rule suffered significant legal infirmity. Congress intended the ESA to work in a tiered system. The 1973 Act's most significant innovations, compared to earlier federal endangered species legislation, were the take prohibition—prior laws did not regulate private activity affecting endangered species—and protection of threatened species. Before 1973, the federal government only looked at species that were currently at risk of extinction.

Congress explained how those two innovations were supposed to work together. If you look at the text of the statute, if you look at the legislative history, it is clear that the take prohibition was considered a last resort.[23] It's the backstop to ensure that endangered species don't go extinct. But it's also equally clear that Congress did not intend take of threatened species to be generally regulated, but for such regulation to be the rare exception. Instead, they expected states, landowners, and conservation groups to, without unnecessary federal interference, develop innovative ways to recover threatened species.

Ultimately, the new 4(d) rule will not only bring FWS in conformity with the law, it will also provide better incentives for landowners to conserve and recover rare species. That's why Pacific Legal Foundation filed the rulemaking petitions[24] that led to these reforms. I also recommend to you a law review article I wrote for the *Pace Environmen-*

18. *See* Jonathan Wood, *A Bug's Life*, PERC (May 3, 2019), https://www.perc.org/2019/05/03/a-bugs-life/ (describing how this approach was used to reward efforts to recover the American burying beetle).
19. *See* Jonathan Wood & Shawn Regan, *Interior Has Revised Endangered Species Rules—What Happens Now?*, The Hill, Aug. 19, 2019, *available at* https://thehill.com/opinion/energy-environment/457605-interior-has-revised-endangered-species-rules-what-happens-now (discussing how the new rules will benefit state efforts to recover the lesser prairie chicken and private efforts to recover the monarch butterfly).
20. FWS & NOAA, Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15100 (Mar. 28, 2003).
21. *See* Wood, Road to Recovery, *supra* note 11, at 18-21.
22. *See* Defs. of Wildlife v. Jewell, 815 F.3d 1, 46 ELR 20046 (D.C. Cir. 2016).
23. *See* Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23 (2015).
24. *See* Pacific Legal Foundation, *Petitions to Repeal 50 C.F.R. §17.31: Unauthorized Expansion of the ESA Is a "Take" of Landowners' Rights*, https://pacificlegal.org/case/national-federation-of-independent-businesses-v-fish-and-wildlife-service-1-1502-washington-cattlemens-association-v-fish-and-wildlife-service-1-1514/.

tal Law Review[25] explaining why the blanket rule violated the ESA, and a 2018 PERC report[26] explaining why this reform can provide better incentives to recover species.

I do want to say a few words about the new critical habitat rule. As Jake said, unoccupied areas were historically not designated as critical habitat. That's in part because, prior to 2016, there was presumption for designating occupied habitat before looking at unoccupied critical habitat. So, to some extent, the new rules are a return to the prior long-standing policy. But the rule also reflects the importance of incentives.

Designation of private land as critical habitat does not necessarily do anything. Absent some federal hook, like a permit or funding, these designations do not affect how private land is regulated. Consequently, critical habitat designations are far more effective for occupied areas where the take prohibition provides the needed federal hook. Designation of unoccupied areas, by contrast, may do nothing to encourage conservation. The recent decision from the Supreme Court in *Weyerhaeuser Co. v. United States Fish and Wildlife Service*[27] is a good example. The federal government designated 1,500 acres of land in Louisiana as critical habitat for the dusky gopher frog despite the fact that the species didn't and couldn't live there without the owner undertaking significant habitat restoration effort. FWS acknowledged that it couldn't make the owner convert the land.

As one would expect, that generated a lot of conflict in the frog case, conflict that rose all the way to the Supreme Court. But there was no conservation benefit to offset these costs because the designation failed to encourage any habitat restoration effort.[28] From the landowner's perspective, the land's potential to be converted into habitat became a huge financial liability, with FWS itself estimating the cost to the landowner could be as high as $34 million. Imposing a cost like that is not a very good way to build goodwill. Instead, it tends to salt the earth, ensuring that the landowner will never restore habitat on that land.

Finally, I want to note that the first lawsuit against these new rules was filed this week.[29] This is likely just the opening salvo, and you should expect more lawsuits.[30] The initial complaint only covers three procedural issues. First, it argues that FWS and NMFS should have done a full National Environmental Policy Act (NEPA)[31] review rather than relying on a categorical exclusion for these rules. Second, it argues the agencies didn't adequately respond to comments. Third, it argues that the §7 rule concerning consultation violates the ESA.

This complaint will likely be amended to include substantive claims after the ESA's 60-day notice requirement is satisfied. The litigants' 60-day notice letter[32] set out additional, substantive objections to the new rules. Several of those claims likely face an uphill slog. For instance, where the new rules merely codify existing policy or involve one agency adopting a rule that the other has long had, a court is unlikely to hold that the policies violate the ESA, as the effect could be to overturn decades of practice and, perhaps, a substantial number of cases upholding it.

Perhaps, the most interesting argument included in the 60-day letter is that how the agencies adopted these rules violates *Encino Motorcars, LLC v. Navarro*.[33] That case has been typically interpreted to accept that agencies can change long-standing policies so long as they acknowledge they're doing so and offer reasons for the change. The 60-day letter, however, reads the law very differently, arguing essentially that *Chevron*[34] deference should not apply when an agency changes its prior position. I'm skeptical about whether that's an accurate representation of *Encino Motorcars*. But given the Supreme Court's recent skepticism of *Chevron* deference, this will be an interesting issue to follow.

Jake Li: Thank you for a perspective from incentives on conservation, as well as a summary of some of the legal challenges that we're seeing already. We can now go to questions and answers.

Hannah Keating: We have one question for Peg as well as for the greater panel. Can you discuss the purpose and anticipated impact of the economic analysis provision of the new rule?

Peg Romanik: There is no economic provision. An economic provision was taken away. If you read the preamble, there's a long discussion about why, and there are also discussions about what that means. I think it's important to note that this regulation does not say if economic analysis is done, when it will be done, who will do it, or how it will be done. It simply pulls away a portion of the regulation that talked about economic analysis.

So, there is no regulatory framework right now. There is no policy in this document that says that the Administration, DOI, or the Department of Commerce will do an economic analysis. Again, I think the devil will be in the

25. *See* Wood, *Take It to the Limit*, *supra* note 23.
26. *See* Wood, Road to Recovery, *supra* note 11.
27. 139 S. Ct. 361, 48 ELR 20196 (2018).
28. *See* Tate Watkins, *If a Frog Had Wings, Would It Fly to Louisiana?*, PERC Reports, July 13, 2018, *available at* https://www.perc.org/2018/07/13/if-a-frog-had-wings-would-it-fly-to-louisiana/.
29. *See* Earthjustice, *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.
30. A few weeks after this Dialogue, 17 states filed a challenge to these rules. *See* Gene Johnson, *17 States Sue Trump Administration Over New Rules Weakening the Endangered Species Act*, Time, Sept. 25, 2019, *available at* https://time.com/5686513/17-states-endangered-species-act-lawsuit/.
31. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
32. *See* Letter from Kristel L Boyles, Staff Attorney, Earthjustice, and Paulo Palugod, Associate Attorney, Earthjustice, to David Bernhardt, Secretary, DOI, Margaret Everson, Acting Director, FWS, Wilbur Ross, Secretary, Department of Commerce, and Chris Oliver, Assistant Administrator for Fisheries, NMFS (Aug. 20, 2019), *available at* https://earthjustice.org/sites/default/files/files/60%20Day%20Letter%208-20-2019%20FINAL.pdf.
33. 136 S. Ct. 2117 (2016).
34. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).

details if an agency decides to do economic analysis. But nothing in this regulation says that it would be done, that FWS will do it, or when it would be done.

Greg Sheehan: We had one panelist comment that FWS is never going to come up with time to do any sort of economic analysis on a species. I would remind everyone that when FWS does the recovery planning for the species, they do an economic analysis as part of that recovery plan. It needs to be done preferably within one year of a listing determination where possible. So, it's not out of the wheelhouse or out of the normal practice that these sorts of economic issues could be generated or evaluated. I don't know either how this change might ultimately be implemented. It might change the time line, but certainly not change the scope of practice that FWS considers as it works to recover species.

Jake Li: Thanks, Greg. Did you mean to refer to critical habitat designation and the economic analysis?

Greg Sheehan: No. I'm saying an economic analysis is done anyway as part of a recovery plan. So, that's what I was referring to, the economic analysis.

Hannah Keating: This question again is for the greater panel. How does NEPA figure into ESA changes, especially since the NEPA regulations are under review?

Peg Romanik: Well, these actions would have been taken under what the NEPA regulations are now. As many of us who do ESA like to say, we don't do NEPA. That's a procedural statute. Other people did look at the NEPA analysis. A NEPA analysis was done for these regulations, and it was decided that a categorical exemption was the appropriate NEPA analysis. But I can't speak to the substance of that.

Ramona McGee: Jonathan already mentioned this about the first lawsuit that's been filed. That is one of the big claims here, that the agencies failed to comply with NEPA by claiming this categorical exclusion. It points to some pretty compelling evidence that these regulatory changes will have extensive impacts on the human environment and should be considered under NEPA.