



ENVIRONMENTAL POLICY  
**INNOVATION**  
CENTER

# ENDANGERED SPECIES ACT: 2018 ADMINISTRATIVE REFORM

## Initial Perspectives on Proposed Regulatory Changes



July 2018



Bombay Hook National Wildlife Refuge, Delaware. CC BY-NC-ND-2.0 Laura Pontiggia.

## **A BALANCED LOOK AT THE PROPOSED ENDANGERED SPECIES RULES**

In July, the two federal wildlife agencies that oversee the Endangered Species Act (ESA) released their proposals to amend some of the rules that implement the law. Most of the initial media coverage of the proposals has been disappointing and hyperbolic, nearly devoid of balanced, objective analysis. The Innovation Center wants the ESA to work better for wildlife and people, and believes that a constructive dialogue on the proposals will best advance this goal. For that reason, we are publishing this initial analysis of the proposals.

The proposals affect four functions of the ESA: how agencies decide whether to list species, how they designate habitat as critical, consultation between federal agencies intended to minimize harm to species (section 7 of the ESA), and special rules for threatened species (section 4(d) of the ESA).

Two decades have passed since the two federal wildlife agencies—the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS)—proposed such comprehensive changes to their ESA rules. The July proposals have alarmed many people because they were released by the current administration, but we know that many of the proposals were first introduced by career Services biologists in 2017 rather than by political appointees. This report summarizes some of the most controversial or noteworthy proposals, and evaluates each on its merits.

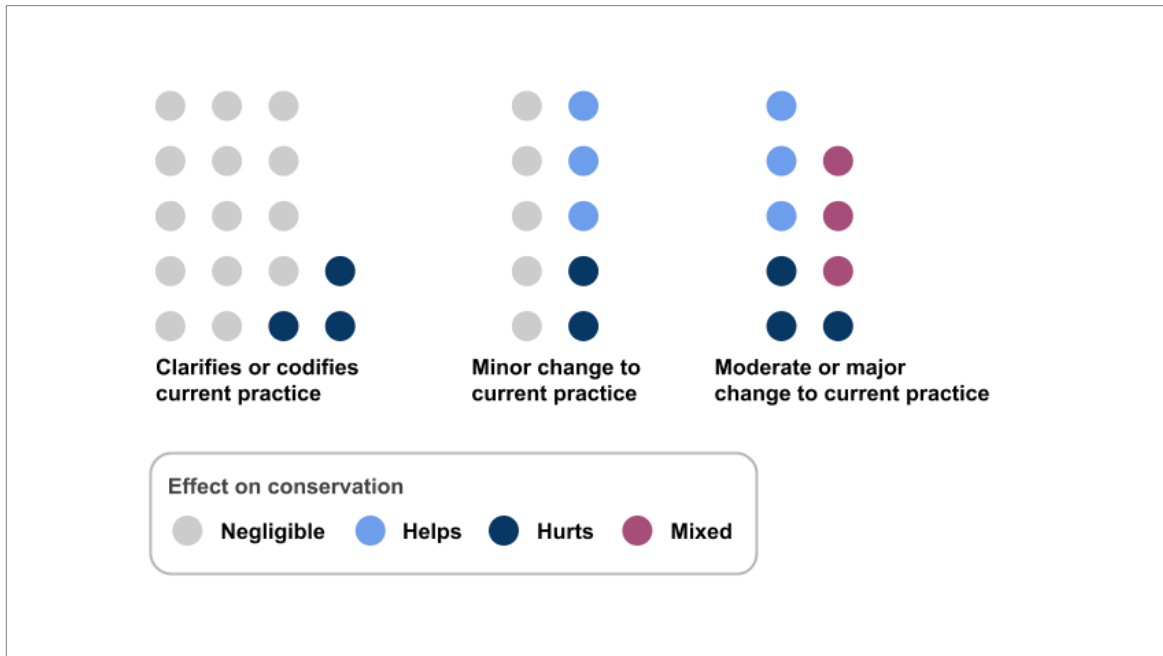
### **BIG, BAD, AND UGLY?**

We counted 36 distinct proposals in the rulemaking package, although media coverage has focused on only a few of them.<sup>1</sup> Are those few representative of the entire package? No, nearly half of the proposals are reasonable bookkeeping, codifying into regulations what is existing practice at the agencies. For example, one proposal would specify in regulations the current standards for when federal agencies should start formal consultation. Although those bookkeeping proposals do not grab headlines, they can improve the clarity and consistency of how the ESA is administered, and sometimes make it faster or more efficient to implement. Balancing your finances may not be exciting, but it helps keep your life in order. The same is true for periodic updates to environmental rules and policies.

### See the 36 proposals online

We have posted our initial views on each proposal at <http://policyinnovation.org/esaregs18> and will update the contents as we learn more about the proposals.

### Effects of the 36 proposals



Of the 36 individual proposals, 19 will likely have negligible effects on conservation, 6 will likely have positive effects, 8 will likely have negative effects, and 3 will likely have mixed effects. You can see which category each proposal belongs to at <http://policyinnovation.org/esaregs18>

To be sure, not all of these bookkeeping proposals would help conservation. As the figure above shows, three of them would codify practices that we think undercut wildlife conservation. But it is inaccurate to claim that the proposals would change those practices for the worse. We discuss some of those proposals in greater detail later.

Of the remaining proposals, ten would cause minor changes to current practice and nine would cause moderate or major changes. Most of the coverage on the rulemaking has focused on three of the major changes: removing the prohibition on referencing economic impacts in listing decisions, changing the order and standard for designating unoccupied habitat as critical, and withdrawing the general 4(d) rule that automatically extends section 9 protections for endangered species to threatened species. We will discuss each of these proposals later, but we first start with some good news.

### **FASTER CONSULTATIONS AND BETTER INCENTIVES FOR RECOVERY**

The six proposals we ranked as, on the whole, helping conservation all affect the consultation process—through which a federal agency is required to ask one (or both) of the Services about how its proposed project might affect listed species. None of the proposals offers bold improvements to the process, but collectively they should reduce the time and money that federal agencies spend on consultations. Greater efficiency allows the

agencies to do more productive things for wildlife, such as fund and implement projects to restore habitat. The proposed process improvements should also reduce complaints about the costs of complying with the ESA, which eases the political pressure on the law.

Two of the proposals focus on easier ways to initiate formal consultation—by reducing the paperwork needed to initiate consultation and by allowing federal agencies to group related projects when they initiate consultation. Another proposal should reduce the time to write biological opinions by allowing the Services to adopt analysis they or other agencies have completed elsewhere. There’s nothing earthshattering here, as most of these proposed changes are already allowed by the current consultation handbook. That handbook was published in 1998, however, and has never been thoroughly updated. Codifying these best practices provides other agencies and the public with clearer, more affirmative direction. Considering that FWS completed an average of 11,344 consultations annually from 2011-17, even small changes can yield outsized effects. In fact, we regularly hear that Services staff lack the time to work on recovery actions and voluntary conservation plans because they are consumed with section 7 consultations and listing decisions. Reducing the section 7 paperwork, without compromising the quality of the work, can free agency staff to pursue other efforts that directly promote recovery.

Two other proposals are vague but intriguing. One is called an “optional collaborative consultation process,” which would allow federal agencies and the Services to streamline consultations for certain types of actions. The change would likely involve the federal agencies playing a larger role in providing the Services with analysis and documentation that the Services would normally complete by themselves during formal consultation. The proposal explains that the Services could then add “any necessary supplementary analyses and incidental take statement” in finalizing their biological opinions. This approach shifts more of the paperwork and analyses to agencies that want the project, without undercutting the Services’ legal authority under section 7.

The other proposal involves creating an expedited consultation process for certain types of actions. The proposal explains that “[c]onservation actions whose primary purpose is to have beneficial effects on listed species will likely be considered appropriate for expedited consultation.” We can envision the Services using this process to expedite a consultation if a federal agency agrees to offset most or all of the harmful effects of its proposed project, thus creating a “net gain” for the affected species and helping it recover. In that situation, an agency can choose to go beyond the bare minimum needed to comply with section 7, in return for a faster or easier consultation. This is the bargain struck between FWS and the Army Corps of Engineers in a widely-acclaimed 2013 conservation plan to conserve three listed species in the lower Mississippi River, which had the Corps offering to do more conservation than what the ESA requires. According to the Corps, “Conservation Plans offer greater predictability and efficiency in ESA compliance and streamline the Biological Opinion process under 7(a)(2) of the Act.”<sup>2</sup> The U.S. Forest Service is now considering a similar approach, which the proposal for expedited consultations would likely encourage.

Little of this is groundbreaking. FWS already issued a memo in November 2016 describing a process to streamline consultations on recovery actions, and NMFS has been using programmatic consultation for



California red-legged frog, a species covered by over 1,000 formal consultations since 2008, mostly from U.S. Army Corps of Engineer projects.

restoration actions for over a decade “to promote more consistent use of conservation measures, more efficient workload management, and better customer service.”<sup>3</sup> But codifying this approach could invite even more federal agencies to the table for recovery. That bigger tent is what the ESA has needed for decades.

## THE MOST CONTROVERSIAL PROPOSALS

Three proposals have caused the most alarm. We discuss each one below, putting them into context.

### Referencing economic impacts in listing decisions

The agencies propose to remove language in the listing regulations that requires the Services to make listing determinations “without reference to possible economic or other impacts of such determination.” The proposal would still prohibit the Services from *considering* those impacts in listing decisions, but allows them to publish the impacts as part of the decisions (*i.e.*, to “reference” it). The Services have not indicated how often they plan to use their discretion to publish the impacts, so the practical implications of this proposal are unclear.



The lesser prairie chicken was listed in 2014, a decision that some people claimed would have widespread economic impacts. FWS delisted the species in 2016 in response to a court order and is currently evaluating a petition to relist the species. FWS also issued a 4(d) rule for the species that excluded many types of activities from the prohibitions of section 9 of the ESA. CC BY-2.0 Larry Lamsa.

We see three issues with this proposal. One is the difficulty in preventing the impacts from influencing the outcome of a listing decision. There is ample room in the current listing standards for non-biological factors to create that influence, because listing decisions are risk assessments that were never (and will never) be based solely on scientific factors.<sup>4</sup> Publishing the impacts can exacerbate that muddiness between biological and non-biological factors. A second concern is that wildlife-related economic analysis remains very basic and focused on the negative economic effects of listing while overlooking some positive effects. The latter—which can include ecotourism revenue and increases in property value from adjacent properties enrolled in conservation easements—can be difficult to estimate with accuracy, so it often gets left out in economic impact analyses. Finally, we question the value of the Services spending more of their limited resources to produce any impact analyses that may not have a purpose of guiding recovery strategies or improving the effectiveness of other

ESA activities.

### **Designating unoccupied critical habitat**

The second hotly-contested proposal is the change to when and how the Services may designate unoccupied habitat as critical. There are three parts to this proposal: evaluating occupied habitat before evaluating unoccupied habitat; identifying the two situations when unoccupied habitat is deemed “essential”; and requiring a “reasonable likelihood” that unoccupied area contribute to conserving the species. The main problem with forcing the Services to evaluate occupied habitat first is that it creates the risk of overlooking unoccupied habitat whose use may be more effective or less costly at recovering species. The proposed language, however, tries to reduce this concern by allowing unoccupied habitat to be designated if doing so would result in more “efficient conservation.” By that, the agencies mean conservation that is “effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species.” Those objectives are laudable and, at least the first two, have broad support among conservationists. Does this proposed definition offer the Services enough flexibility to continue designating unoccupied habitat as needed? Possibly, but much of the public discourse already seems to have presupposed that it would not be.

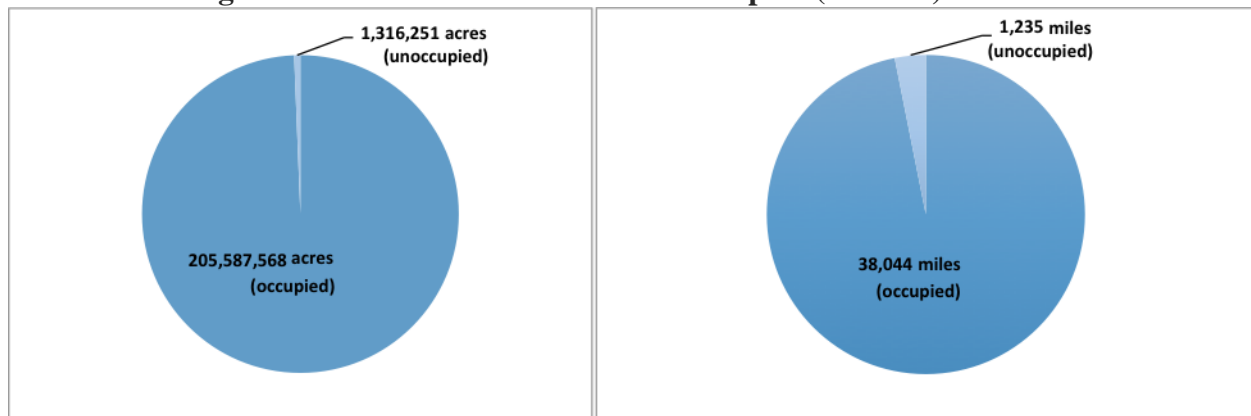
The proposal would also require that any unoccupied habitat present a “reasonable likelihood” of contributing to species conservation. The Services explain that they “might conclude that an area is unlikely to contribute to the conservation of the species where it would require extensive affirmative restoration that does not seem likely to occur such as when a non-federal landowner or necessary partners are unwilling to undertake or allow such restoration.” This is similar to what happened when FWS designated Unit 1 as unoccupied critical habitat for the dusky gopher frog, a conflict that gave rise to the *Weyerhaeuser Co. vs. U.S. Fish and Wildlife Service* case that the U.S. Supreme Court will hear in October 2018. Had the “reasonable likelihood” requirement been in place when FWS was evaluating critical habitat for the frog, the agency might not have designated Unit 1. Despite the biological importance of Unit 1—it contains breeding habitat that no longer exists elsewhere in the frog’s historic range—we have not seen anyone explain how the designation would someday result in the owner of Unit I authorizing the reintroduction and habitat management needed to recover the species. This conundrum is one that the ESA is poorly equipped to address. The proposed changes sidestep this issue by decreasing the chances that the Services would designate unoccupied habitat in controversial situations, but they do not resolve the underlying question of how FWS is supposed to conserve areas like Unit 1 or recover species without those areas when scientists conclude it is not possible to do so.



The dusky gopher frog and its habitat in De Soto National Forest, Mississippi. In 2013, scientists discovered the frog in the pond pictured. De Soto plans to restore 13,400 acres of longleaf pine over nine years as part of the U.S. Department of Agriculture’s Collaborative Forest Landscape Restoration Program. Credits: John Tupy (frog), USDA (pond).

The *Weyehaeuser* case has drawn a lot of attention to unoccupied habitat, but how often do the Services designate such habitat? Among all FWS critical habitat designations from 2008-17, 144 had occupied habitat only and 43 others included some unoccupied habitat.<sup>5</sup> By size, only 0.6% of FWS terrestrial critical habitat was unoccupied, and only 3.1% of aquatic habitat was unoccupied. NMFS finalized 23 designations during this time, none (0%) of which included unoccupied habitat. These numbers question the extent to which the regulatory proposals would change the practice of unoccupied designations. We are not suggesting that the Services were correct in largely ignoring unoccupied habitat (no one has studied that issue), but the data suggest that the Services have not relied heavily on unoccupied designations in the past and might not have suddenly begun doing so even without the proposed changes to unoccupied designations. Although the changes have attracted a lot of attention, they might not drastically alter species conservation compared to the status quo.

**Amount of designated critical habitat that was unoccupied (2008-17)**



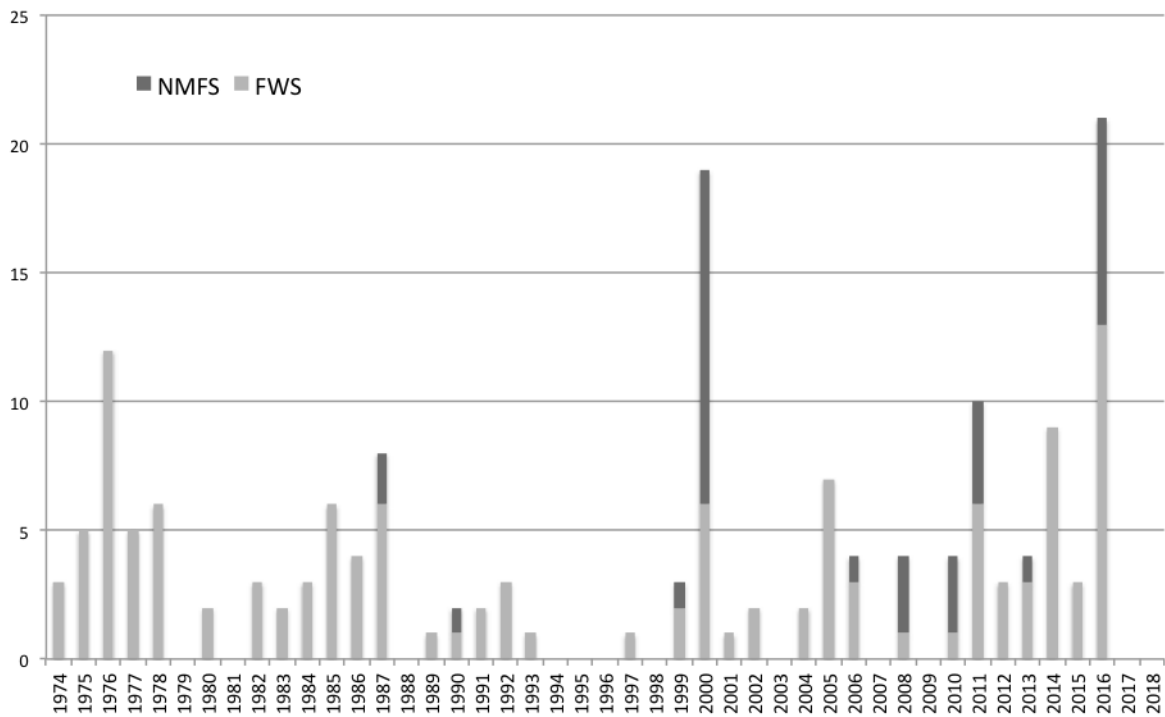
According to FWS data, unoccupied habitat was only a small percentage of the total amount of critical habitat that FWS designated from 2008-17.

### **Withdrawing the general section 4(d) rule for threatened species listed in the future**

Under the ESA, section 9 protects only “endangered” species. In 1975, however, FWS issued a “general” 4(d) rule that extends those protections to all threatened animal species, and the agency did the same for all threatened plant species in 1977. FWS can override its general rules on a case-by-case basis by issuing a “special” 4(d) rule for a species. By contrast, NMFS never issued a general 4(d) rule, so any section 9 protections for its species must come from a species-specific 4(d) rule. A study that one of us (YL) completed last year found that 49% (116) of all FWS animal species listed as threatened were covered by a special 4(d) rule, with mammals, fish and reptiles making up 85% of those species.<sup>6</sup> NMFS covered 61% of its threatened animal species with a 4(d) rule; the rest were without any section 9 protections.<sup>7</sup> Further, FWS was already issuing an increasing number of species-specific 4(d) rules during the last decade. Through May 2016, the Obama administration listed 55 species as threatened and covered 35 species using species-specific rules, as shown in the chart on the next page.<sup>8</sup> We expect that trend to continue, so the effect of FWS withdrawing its general 4(d) rules is largely limited to those species the agency would not have covered under its general rules.

Against that backdrop, we believe that withdrawing the general rules for future-listed species will have mixed results on conservation, with considerable variation across species. We see the withdrawal as worrisome in at least three situations. First, FWS might not issue a special 4(d) rule upon listing or soon after, even when the species would benefit from section 9 protections. The lapse in protection could mean missed opportunities to prohibit destructive activities through section 9 or to enroll landowners in habitat conservation plans, which are not required absent the take prohibition.

## Number of species covered by species-specific 4(d) rules



Second, FWS might decline to issue a species-specific 4(d) rule because of sociopolitical pressure to minimize the regulatory impacts of listing. By contrast, under the general 4(d) rule, FWS has to go out of its way to reduce protections. Sociopolitical pressures are very real, and FWS has not always handled the pressures in ways that benefit conservation.

Third is the potential lapse in protection for plants. FWS has never issued a special 4(d) rule for any plant species, allowing its general 4(d) rule for plants to protect all 175 species listed as threatened. By withdrawing the general rule, FWS would need to begin spending time and resources to issue species-specific 4(d) rules for new threatened plant species, assuming the agency wants to maintain current levels of protections for this group. Our concern, however, is minimized by the fact that the section 9 protections for plants are considerably weaker than those for animals, largely because the ESA does not extend the take prohibition to any plant. Although the 1988 amendments to the ESA protect endangered plants from malicious damage on federal lands or from removal, cutting, digging up, or damage done in knowing violation of state law, FWS never updated its general 4(d) rule to reflect the added protections. The failure to act suggests that FWS sees the rule as playing a limited role in protecting plants.

NMFS has never issued a general 4(d) rule, but does not seem to have experienced any of these three problems with regularity nor seen consistent public outcry over how it handles 4(d) rules. One potential reason is that the contents of NMFS rules are noticeably different from those of many FWS rules. As discussed later, nationwide guidance on when and how the Services use species-specific 4(d) rules should reduce these discrepancies.

Finally, we point out the workload of writing potentially hundreds of species-specific 4(d) rules in the coming decade. That workload, however, might be outweighed by the time that FWS saves from avoiding the need to review and approve incidental take permits for activities excluded by a 4(d) rule—especially if those rules



specify avoidance, minimization, and mitigation measures with better conservation standards than those required for a habitat conservation plan.

Withdrawing the general 4(d) rules could offer at least two distinct advantages for some species. First, it would encourage FWS to think more purposefully about what protections to extend to threatened species, rather than simply defaulting to the general rules. In some situations, FWS may decide that the benefits of regulating an activity are exceeded by the drawbacks of doing so. For example, an activity that only minimally threatens a species may not be worth the time and cost for FWS and the public to deal with incidental permitting for that species. FWS's time is limited and might be better spent on other activities. Second, FWS can rely on the "necessary and advisable" standard in section 4(d) to issue species-specific rules that create "protective measures beyond those contained in [section 9]," as the U.S. Court of Appeals for the D.C. Circuit has stated.<sup>9</sup> In the special rules for African lion and African elephants, FWS took a step in this direction by increasing protections beyond those offered by the general 4(d) rule. Of course, FWS need not withdraw the general 4(d) rules to take advantage of these benefits, but doing so might prompt the agency to tailor protections more often.



Left: FWS stocking over 8,000 Lahontan cutthroat trout in Fallen Leaf Lake, Tahoe Basin, CA. Right: A spawning trout at the Marble Bluff Fish Passage Facility, NV. The trout is one of over 115 FWS-listed species covered by a species-specific 4(d) rule. The 1975 rule for the trout exempts state-regulated fishing, which FWS determined "does not pose a significant threat" to the trout outside the western Lahontan basin.

We predict that FWS will finalize its withdrawal proposal because it has the clear legal authority and apparently a strong motivation to do so. Moving forward, we urge the agency to focus on improving when and how it uses 4(d) rules. One improvement is to draw a much clearer line between threatened and endangered species, as this distinction sets the foundation for which species are affected by the proposed withdrawal. The Services have improved their classification process over the years, but have yet to adopt a more objective or quantitative classification system. Doing so would vastly improve the consistency, predictability, objectivity, and defensibility of listing decisions. In a 2011 study involving 21 experienced Services biologists, the authors found meaningful differences in interpretation of basic concepts like extinction and time to extinction:

Even biologists experienced with ESA listing decisions had difficulty judging endangerment and articulating their reasons for making particular judgments. The absence of stable and clear methods and preferences for judging extinction danger and linking predictions to endangerment classification calls into question the current—best professional judgment approach to regulatory decision making.<sup>10</sup>

Another major improvement to 4(d) implementation is for the Services to develop national guidance on when and how they develop species-specific 4(d) rules. The absence of nationwide guidance will become particularly

evident as FWS relies increasingly on those rules. At a minimum, we recommend that nationwide guidance describe how and when FWS would issue species-specific rules, including providing clarity to private landowners about which types of voluntary conservation activities qualify for 4(d) exclusions; incentivizing collaborative conservation with states; incorporating adequate avoidance, minimization, and/or offset measures in a 4(d) rule, so that a covered species is no worse off than if it had been covered by a section 10 agreement; and using science-based metrics to evaluate the effects of excluding certain activities.<sup>11</sup>

## **OTHER NOTEWORTHY PROPOSALS**

Among the 36 proposals, several others have led to confusion, concern, or concern arising from confusion. It is beyond the scope of this initial report to cover all of those proposals, but we will address some below.

### **Defining the “foreseeable future”**

A threatened species is one that is likely to be in danger of extinction in the “foreseeable future.” The Services have never defined this phrase using objective or quantifiable metrics, leading to widespread concern about whether the agencies have applied it consistently. The agencies are now proposing to define that phrase in their regulations for the first time. Unfortunately, mischaracterization of this proposal has been widespread in the media. An example comes from the July 22<sup>nd</sup> piece from the The New York Times Editorial Board:

A third proposal could make it harder for some species to gain a foothold on the threatened list to begin with. The statute defines a threatened species as one “that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The Obama administration defined “foreseeable future” liberally—for instance, listing the Arctic bearded seal as threatened because the ice sheets the seal relies on would almost certainly disappear by the end of the century because of global warming. That’s too speculative for the Trump people, whose scientists and policymakers will henceforth be required to “avoid speculating as to what is hypothetically possible.” To Mr. Carper, that’s a clear invitation to limit protections for species threatened by climate change, of which there are many.<sup>12</sup>

Similarly, a July 19<sup>th</sup> story in the Times reported that the proposed definition would give the Services “greater” (implying a change) leeway to deny listings:

Thursday’s proposals also include a change that, while technical, could give the government greater leeway to play down climate change in judging whether a plant or animal is at risk of extinction. Environmentalists criticized the change—which involves writing a new definition for the term “foreseeable future”—as giving the government greater leeway to discount future effects of global warming.<sup>13</sup>

The problem with this coverage is that it is factually incorrect, and the top Google search result for “FWS foreseeable future” quickly reveals why. During the Obama administration, FWS decisions that involved the “foreseeable future” relied on a 2009 Department of the Interior memo published by the George W. Bush administration that interpreted this phrase.<sup>14</sup> Here are the relevant parts from the memo, verbatim (italics added):

- The Secretary’s analysis of what constitutes the foreseeable future for a particular listing determination must be rooted in the best available data that allow predictions into the future, and the foreseeable future extends *only so far as those predictions are reliable*. “Reliable” does not mean “certain”; it means

sufficient to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act.

- With respect to any relevant prediction, when the point is reached that the conclusions concerning the trends or the impacts of a particular threat are *based on speculation, rather than reliable prediction*, those impacts are not within the foreseeable future.
- Indeed, a number of courts have interpreted the best-data-available standard set forth in section 4(b)(1) to prohibit the Secretary from basing listing determinations on factors *such as speculation*.

Compare those passages to the proposed definition of foreseeable future, and you will find that they are remarkably similar:

The term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable.... The Services need not identify the foreseeable future in terms of a specific period of time, but may instead explain the extent to which they can reasonably determine that both the future threats and the species' responses to those threats are probable.

In sum, for the last decade FWS has been applying an interpretation of the foreseeable future that is comparable to the one being proposed. The core elements are identical: predictions must be reliable or probable, and certainty is not required but speculation is not allowed. Using this approach, the Services listed over 60 threatened species from 2010 through 2017.



The Pacific walrus was denied listing in 2017 based on a “foreseeable future” that extended only to 2060. Credit: USGS.

The Obama and the Trump administrations both denied listing certain species based partly on their skepticism about the future effects of climate change on those species. The North American wolverine is an example from the Obama administration, and the Pacific walrus is an example from the current administration. Our opinion is that to the extent FWS misapplied the foreseeable future standard in those and other decisions, an underlying reason is the tremendous flexibility the Services have afforded themselves in interpreting that phrase. Despite the detailed interpretation of foreseeable future in the 2009 Interior memo, Services biologists have great

latitude to decide when projections about the future are no longer “reliable” or “probable.” Those concepts are inherently subjective, and the fact-specific nature of the listing analysis only compounds the problem. A more objective or quantitative approach could bring greater transparency and consistency to listing decisions, and an earlier report we produced offers recommendations on how to pursue this objective.<sup>15</sup> We believe the proposed definition of foreseeable future has shortcomings, but not the ones many media sources have described.

### **Destruction or adverse modification of critical habitat**

Under the proposed redefinition of destruction or adverse modification, the Services would evaluate whether an activity diminishes the value of critical habitat “as a whole” rather than in smaller geographic units. This is largely current FWS practice and is consistent with the holding in *Butte Environmental Council v. U.S. Army Corps of Engineers*, 620 F.3d 936 (9th Cir. 2010) that where “there is no evidence in the record that ‘some localized risk was improperly hidden by use of large scale analysis, we will not second-guess the FWS.’”

The geographic scale issue nicely illustrates the considerable gap between ESA in theory and in practice. Because recovery occurs at the species-wide scale, it is reasonable to assume that the adverse modification analysis should also occur at that scale. But in practice, we see little evidence of the Services’ ability to determine whether any particular alteration—considered in light of past alterations that affect a species—appreciably diminishes the conservation value of critical habitat. The primary reason is that the agencies have yet to develop an official system to track the cumulative effects of past disturbances on a species’ recovery prospects. For example, there is no nationwide system to track the amount of authorized incidental take for most species, as documented in a 2009 Government Accountability Office report.<sup>16</sup> This problem is tantamount to an airline that continues to sell tickets without knowing how many it has sold. And even when agency biologists track cumulative incidental take through informal methods, there is little evidence of widespread use of the information to inform the jeopardy/adverse modification analysis. Without a process to track cumulative incidental take *and* other alterations to critical habitat, the agencies often lack the context to properly determine whether a particular alteration diminishes the value of critical habitat for recovery. For this reason, we believe that analyzing adverse modification based on critical habitat “as a whole” is ineffective at this moment. The agencies should thus focus the adverse modification inquiry at smaller geographic scales that are manageable for them to analyze. Appropriate scales could include individual critical habitat units, recovery units (where available), and units in species conservation plans.



Vernal pool tadpole shrimp, one of several species at issue in the *Butte Environmental Council* case. CC BY-NC-2.0 Ken-ichi Ueda.

If the agencies insist on analyzing adverse modification at the broadest scale possible, they should develop systems to monitor the status of critical habitat and describe the implications for recovery. Fortunately, the technology exists to do that today. Databases to track incidental take can be developed for a very low cost, and satellite imagery allows the agencies and conservationists to track many types of habitat disturbances. The agencies can also enable the public to help with compliance monitoring by posting online all biological opinions and other permitting documents.

For now, however, we predict the Services will finalize their proposed definition, continuing their current practice that can easily overlook the additive effects of multiple alterations to critical habitat. Under this approach, we see critical habitat continuing to play a very limited—and deliberately constrained—role in helping species recover.

### **“Baseline” and “tipping point” concepts in jeopardy findings**

The Services are affirming two aspects of how they interpret the jeopardy prohibition, both of which we believe can impede conservation in practice. The first is clarifying that even the most imperiled species cannot already be “in jeopardy” solely because of baseline conditions for the species, such that any additional harmful effect automatically triggers a jeopardy or adverse modification finding. For example, FWS would not conclude that a species whose entire population consists only of three individuals is in a state of jeopardy. We agree with the Services that the jeopardy definition focuses mainly on the effects of a proposed agency action, not the baseline condition of a species. But in practice, the public often has great difficulty understanding when the Services are likely to find jeopardy. The concept of baseline jeopardy provides the public and regulated community with an imperfect but useful proxy for when a species cannot tolerate additional harm without seriously undercutting its survival or recovery prospects. Although the Services do not have to endorse this concept, they should identify a rigorous method that explains how the likelihood of jeopardy could change depending on a species’ degree of imperilment. That clarity would benefit industry and other federal agencies by providing them with greater certainty about the types of effects to certain species or habitat they would need to avoid.

The Services are also clarifying that, during consultations, they are not required to identify a “tipping point” beyond which a species cannot recover. The agencies point to several court decisions that impose this requirement, and explain that neither the ESA nor the section 7 regulations state this requirement. While this is correct, the underlying issue remains: how will the Services explain in a consistent and transparent way when impacts to a species preclude its recovery? The regulatory proposals offer no hints at a solution, merely explaining that the Services have “discretion as to how it will determine whether the statutory prohibition is exceeded.” This lack of predictability makes business planning harder for federal agencies and their applicants, both of whom might be better off planning in advance to avoid impacts to a critically endangered species instead of being surprised by a jeopardy finding.

### **Not-prudent determinations for critical habitat**

The Services are proposing two changes to how they decide whether designating critical habitat would not be prudent. First, the agencies would no longer default to issuing a not-prudent determination if either of two specific factors are met: designating critical habitat would threaten the species or would not benefit it. Rather, the agencies “may” issue such a determination if certain circumstances exist. This approach might reduce certainty for the public because there would no longer be automatic triggers for not-prudent determinations.

On the other hand, the uncertainty is mitigated by the proposal to specify in greater detail the circumstances in which the agencies may issue not-prudent determinations. Specifically, the agencies are proposing two circumstances absent from their current regulations: (1) threats to the species’ habitat stem solely from causes

that cannot be addressed through management actions resulting from section 7(a)(2) consultations, and (2) areas within US jurisdiction provide no more than negligible conservation value, if any, for a species occurring primarily outside of US jurisdiction. The first circumstance is likely to apply to habitat affected by invasive species and possibly global climate change, neither of which the current section 7 consultation process addresses well or at all. The underlying rationale behind proposing this circumstance is reminiscent of certain FWS not-prudent determinations from the 1990s, which reasoned that critical habitat designation would not provide benefits beyond those resulting from the jeopardy prohibition. Whether or not you agree with this rationale, we think it accurately reflects the limited role that critical habitat and the adverse modification prohibition have played in most FWS consultations. Many of the adverse modification analyses we have seen in biological opinions are minimal and use boilerplate language.

We think that both proposed circumstances are reasonable from the perspective of ensuring that the Services' limited resources are invested wisely. We would much rather see those resources used for actions that will more yield more direct benefits for the species at issue, such as recovery planning or implementation. We acknowledge that the Services' current funding categories do not allow the agencies to simply transfer unused money from the listing and critical habitat budget to the recovery budget. But we also assume that the agencies could adopt a better budget allocation system in the future, especially if doing so yields clear benefits for enhancing species recovery. For now, the agencies can at least use the funding saved from a not-prudent determination to designate or revise critical habitat for other species that will benefit more from those actions.



Lo'ulu (*Pritchardia napaliensis*), one of less than two-dozen species for which FWS issued a not-prudent determination between 2000 and 2018. Nine of those determinations covered Hawaiian plants like the Lo'ulu.

Finally, despite the concerns we have heard about the not-prudent proposal, we do not think it would drastically increase the percentage of not-prudent findings. The two new circumstances are limited to only certain types of species or habitats. Further, not-prudent determinations have been very rare in the last two decades. The table on the next page shows the 19 not-prudent FWS determinations we found since 2000, nine of which are for very rare Hawaiian plants and 16 of which are based on either threats from collecting, vandalism, or persecution, or extinction of the species in the wild.

### U.S. Fish and Wildlife Service not-prudent determinations since 2000

	Year of determination	Species	Taxon	Reason for determination
1	2016	Northern long-eared bat	Mammal	No benefit for summer habitat; increase threat for winter habitat.
2	2016	Eastern massasauga	Reptile	Threat from collecting and persecution.
3	2015	White Fringeless Orchid	Plant	Threat from collecting.
4	2007	Hidden Lake bluecurls	Plant	Threat from trampling and collecting.
5	2006	Jaguar	Mammal	No benefit - No areas in US met definition of critical habitat. Withdrew finding in 2014.
6	2004	Mariana fruit bat	Mammal	Likely extinct.
7	2004	Guam bridled white-eye	Bird	Likely extinct.
8	2003	Haha ( <i>Cyanea copelandii</i> ssp. <i>copelandii</i> )	Plant	Likely extinct.
9	2003	Holei ( <i>Ochrosia kilaueaensis</i> )	Plant	Likely extinct.
10	2003	Hawai'i pritchardia ( <i>Pritchardia affinis</i> )	Plant	Threat from collecting.
11	2003	Lo`ulu ( <i>Pritchardia schattaueri</i> )	Plant	Threat from collecting.
12	2003	Lo`ulu ( <i>Pritchardia napaliensis</i> )	Plant	Threat from collecting.
13	2003	Wahane ( <i>Pritchardia aylmer-robinsonii</i> )	Plant	Threat from collecting.
14	2003	Lo`ulu ( <i>Pritchardia viscosa</i> )	Plant	Threat from collecting.
15	2003	Alani ( <i>Melicope quadrangularis</i> )	Plant	Likely extinct.
16	2003	Liliwai ( <i>Acaena exigua</i> )	Plant	Likely extinct.
17	2003	Lo`ulu ( <i>Pritchardia munroi</i> )	Plant	Threat from collecting.
18	2002	Unarmored threespine stickleback	Fish	Pre-1978 listing; not required.
19	2001	Rock gnome lichen	Plant	Threat from collecting.

## AN MIXED START, BUT WHAT NEXT?

Although some of the proposals raise legitimate concerns about hindering species recovery, others are reasonable from the standpoint of improving the efficiency and clarity of ESA implementation. Further, some of the beneficial proposals, if given enough attention and staff resources, could improve species conservation significantly. This includes expedited consultations for projects that further recovery. We are not aware, however, of any plans to provide those resources, so we fear the benefits will be modest and left to regional or field office directors within the Services who need to take it upon themselves to invest in the best of these ideas. Among the proposals that have received the most critical media attention, we expect only a few of them to substantially change how the Services implement the ESA.

Given the constant criticism that the ESA has not recovered enough species, we were surprised by the absence of any bold proposals to incentivize voluntary conservation by private, state, or federal landowners. There are ample opportunities to amend ESA regulations and policies to further those objectives. We were similarly surprised by the lack of proposals to expedite recovery planning and to improve the alignment between recovery objectives and critical habitat designations, consultations, and incidental take permitting. If the current administration wants to leave a legacy of ESA success, it should dig deeper into the well for more ambitious reforms aimed at preventing extinction and achieving recovery, especially by streamlining or improving how the law interacts with the public and businesses. We encourage the administration to seek public input on feasible improvements to species conservation. The public, academic experts, state leaders, and the business community affected by the ESA are full of practical experiences and good insights that could help shape the next generation of ESA policies and regulations that do far more for wildlife and people.

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<sup>1</sup> Examples include: The New York Times, *Law That Saved the Bald Eagle Could Be Vastly Reworked*, [www.nytimes.com/2018/07/19/climate/endangered-species-act-changes.html](http://www.nytimes.com/2018/07/19/climate/endangered-species-act-changes.html) (July 19, 2018); The Washington Post, *Endangered Species Act stripped of key provisions in Trump administration proposal*, [www.washingtonpost.com/news/animalia/wp/2018/07/19/endangered-species-act-stripped-of-key-provisions-in-trump-administration-proposal/?utm\\_term=.13c8104e4cfc](http://www.washingtonpost.com/news/animalia/wp/2018/07/19/endangered-species-act-stripped-of-key-provisions-in-trump-administration-proposal/?utm_term=.13c8104e4cfc) (July 19, 2018); and The New York Times, *Lawmakers, Lobbyists and the Administration Join Forces to Overhaul the Endangered Species Act*, [www.nytimes.com/2018/07/22/climate/endangered-species-act-trump-administration.html](http://www.nytimes.com/2018/07/22/climate/endangered-species-act-trump-administration.html) (July 22, 2018).

<sup>2</sup> US Army Corps of Engineers, Mississippi Valley Division, *Conservation Plan for the Interior Least Tern, Pallid Sturgeon, and Fat Pocketbook Mussel in the Lower Mississippi River (Endangered Species Act, Section 7(a)(1))*, <http://www.mvd.usace.army.mil/Portals/52/docs/SandT/Morphology-Potamology/MRGand%20P-Fact-Sheets/17838%20fact%20sheet.pdf>

<sup>3</sup> NOAA Fisheries Northwest, *Streamlining Restoration Project Consultation using Programmatic Biological Opinions* (July 2010).

<sup>4</sup> One of the best articles on this topic is Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 Wash. U. L. Q. 1029 (1997).

<sup>5</sup> U.S. Fish and Wildlife Service, DRAFT Effects Data for the Revision of the Regulations for Listing Species and Designating Critical Habitat; 1018-BC88, 0648-BH42 (June 2018).

<sup>6</sup> Ya-Wei Li, Section 4(d) Rules: The Peril and the Promise, Defenders of Wildlife White Paper Series, <https://defenders.org/publication/section-4d-rules-peril-and-promise> (2017).

<sup>7</sup> *Id.* at 6

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993), reversed on other grounds, 515 U.S. 687 (1995).

<sup>10</sup> Jean F. Cochrane et al. *How Biologists Judge Species Endangerment*, Research Project Report to National Marine Fisheries Service, Protected Species Program and U.S. Fish and Wildlife Service, Endangered Species Program (2011).



<sup>11</sup> Further details on these recommendations appear in a joint letter from the Innovation Center, Environmental Defense Fund, and Sand County Foundation, posted on the regulations.gov document for the 4(d) withdrawal and accessible at <https://goo.gl/iFCV7u>

<sup>12</sup> The New York Times Editorial Board, Donald Trump Has Endangered Species in His Sights, <https://www.nytimes.com/2018/07/22/opinion/editorials/zinke-interior-endangered-species.html> (July 22, 2018).

<sup>13</sup> The New York Times, Law That Saved the Bald Eagle Could Be Vastly Reworked, <https://www.nytimes.com/2018/07/19/climate/endangered-species-act-changes.html> (July 19, 2019).

<sup>14</sup> U.S. Department of the Interior, *The Meaning of “Foreseeable Future” in Section 3(20) of the Endangered Species Act*, <https://www.fws.gov/endangered/esa-library/pdf/M-37021%20Foreseeable%20future.pdf> (2009).

<sup>15</sup> Environmental Policy Innovation Center, *Endangered Species Act: 2018 Administrative Reform, Perspectives and Initial Recommendations*, <http://policyinnovation.org/wp-content/uploads/2018/06/ESA-2018-rulemaking-preview.pdf> (2018).

<sup>16</sup> United States Government Accountability Office (2009). *The U.S. Fish and Wildlife Service Has Incomplete Information about Effects on Listed Species from Section 7 Consultations*. <https://www.gao.gov/new.items/d09550.pdf>

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