DIALOGUE

The Trump Administration's Proposed ESA Regulations

Summary

The U.S. Department of the Interior and the National Oceanic and Atmospheric Administration recently proposed comprehensive changes in how the Endangered Species Act (ESA) is implemented. These address the species listing process, critical habitat designations, and the §7 consultation process. If approved, these rules could have a significant impact on species conservation in the United States. On July 31, 2018, ELI hosted a webinar that highlighted reactions to the proposed changes. The panelists provided an advance look into the potential benefits and repercussions of applying the ESA under these proposed regulations. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Caitlin McCarthy is Director of the Associates Program at ELI.
Ya-Wei (Jake) Li (moderator) is Director of Biodiversity at the Environmental Policy Innovation Center.
Dave Owen is the Harry D. Sunderland Professor of Real Property Law at the University of California, Hastings College of the Law.
Holly Pearen is a Senior Attorney at the Environmental Defense Fund.
Steve Quarles is a Partner at Nossaman LLP.
Jonathan Wood is an Attorney at Pacific Legal Foundation and a Research Fellow at the Property and Environment Research Center.

Editors' Note: Jonathan Wood represents petitioners on two 2016 rulemaking petitions urging this reform, to which the proposed rule was issued in response. See Washington Cattlemens' Associations' Petition to Repeal, 50 C.F.R. §17.31 (filed Aug. 4, 2016), available at https://pacificlegal.org/wp-content/uploads/2017/09/NIFB-and-WCA-Litigation-Petition-8-4-16.pdf; *National Federation of Independent Business' Petition to Repeal 50 C.F.R. §17.31 (filed Mar. 15, 2016), available at* https://pacificlegal.org/wp-content/uploads/2018/04/PLF-Pet-Re-Repeal-Title-50-of-the-Code-of-Reg.-Section-17.31.pdf.

Caitlin McCarthy: On July 19, the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) (the Services) released their highly anticipated proposed changes to rules implementing the Endangered Species Act (ESA).[1] Following the release, the three proposed rulemakings were published in the *Federal Register*[2] and include revision of the regulations for listing species and designated critical habitat, revision of the regulations for prohibitions to threatened wildlife and plants, and revision of regulations for interagency cooperation.

I would like to take a moment to introduce our moderator. Jake Li is the Director of Biodiversity at the Environmental Policy Innovation Center (EPIC). Previously, Jake represented regulated industries and then created 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 sector in saving endangered species.

Jake Li: I'm delighted to be joined by four other expert panelists to talk about the proposed revisions to the endangered species regulations. We hope to provide a spectrum of views ranging from the regulated community to environmental groups.

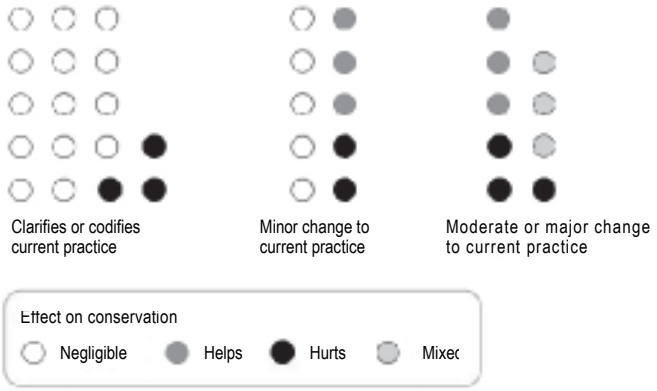
We'll discuss each of the three major parts of the rulemaking, starting with the proposed withdrawal of the §4(d) general rules, followed by the listing and critical habitat proposals, and we'll end with the §7 consultation proposals. First, I want to provide context for each of these three parts and offer some of the perspectives of my organization, EPIC.

To do that, I am going to start with the image in Figure 1. It reflects my effort to go through the three rulemaking packages and carefully pull out each of the notable proposals that I found—and there were roughly 36 notable proposals.[3] Part of the purpose of this visual is to ask: what is the overall effect of these proposals? For those who have

1. *See* Press Release, U.S. Fish and Wildlife Service and NOAA Fisheries Seek Public Input on Proposed Reforms to Improve & Modernize Implementation of the Endangered Species Act (July 19, 2018), *available at* https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-and-noaa-fisheries-seek-public-input-on-&_ID=36286; 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.
0. 83 Fed. Reg. 35178, 83 Fed. Reg. 35193, 83 Fed. Reg. 35174 (July 25, 2018).
2. *Overview of New Endangered Species Draft Regulations*, ENVIRONMENTAL POLICY INNOVATION CENTER, http://policyinnovation.org/esaregs18/ (last visited Sept. 27, 2018).

been following the media coverage on this topic, you might get the impression that there are a lot of really problematic aspects of the proposals from a conservation standpoint.

Figure 1. The Effects of 36 Notable Proposals on the ESA



Source: ENDANGERED SPECIES ACT: 2018 ADMINISTRATIVE REFORM—INITIAL PERSPECTIVES ON PROPOSED REGULATORY CHANGES, ENVIRONMENTAL POLICY INNOVATION CENTER (2018), http://policyinnovation.org/wp-content/uploads/2018/07/ESA-proposals-report.pdf.

So, the question is, are those problematic aspects reflective of the proposals as a whole? What Figure 1 shows is that roughly 17 of the 36 proposals simply codified existing practice. Now, you may or may not like existing practice, but I think the bottom line is that there really isn't going to be a change in how the Services implement the ESA for these 17 proposals. These proposals are largely housekeeping matters that take existing practices, or elements of the *Consultation Handbook*,[4] for example, and put them into the regulations.

Then I found roughly 10 proposals that would result in minor changes to current practice, and nine additional proposals that would result in moderate or major changes to current practice. I also tried to provide my best assessment of the likely effects on conservation of these 36 proposals. My initial sense is that roughly 19 of these proposals would only have negligible effects on conservation because they largely codify existing practice. They mostly try to improve deficiencies in the §7 process, for example. So, they don't result in big changes one way or another for conservation.

I've identified six proposals that I think would actually help conservation—for example, creating incentives for federal agencies to do conservation or improve collaboration with FWS or NMFS on §7 consultations. I've identified eight proposals that I think would actually have a detrimental or negative effect on conservation to one degree or another. And then there are three other proposals that will probably have a very mixed effect depending on the species and how the Services implement those proposals. You don't have to agree with my assessment, but I like to lay it out there to provide a more balanced perspective on what's in this rulemaking package and how the proposals might actually change current practice.

My purpose here again is to just lay the context, provide a little bit of my organization's perspective, and then turn over the discussion to the rest of the panelists so we can dive deeper into some of the specific issues here. The first one I want to talk about is the §4(d) proposal, which is for FWS to withdraw its two general 4(d) rules—one covers animals, one covers plants. What this would mean is that FWS would no longer automatically extend the protections of §9 to newly listed *threatened* species.

As a result, any §9 protections for those species would have to come from rules written specifically for those species by FWS. The timing of when those rules might be written is an open question. It's also worth noting that NOAA Fisheries has adopted this approach since the beginning of the ESA. That agency has never had a general 4(d) rule and instead has issued species-specific rules as appropriate on a case-by-case basis.

My view is that the results of this proposed withdrawal will be really mixed. It's going to vary a lot depending on the species and how FWS actually implements this proposal, assuming it finalizes it.

For some species, I think the withdrawal would probably make no real difference because FWS was already on the path to issuing more of these species-specific 4(d) rules. As you can tell from the chart in Figure 2, under the Barack Obama Administration, even FWS was quite active in issuing more and more of these species-specific 4(d) rules. I don't have any reason to think that the pattern would change in a way that would decrease the number of those rules. I think, for those types of species, withdrawing the general 4(d) rule probably isn't going to make much of a difference one way or another.

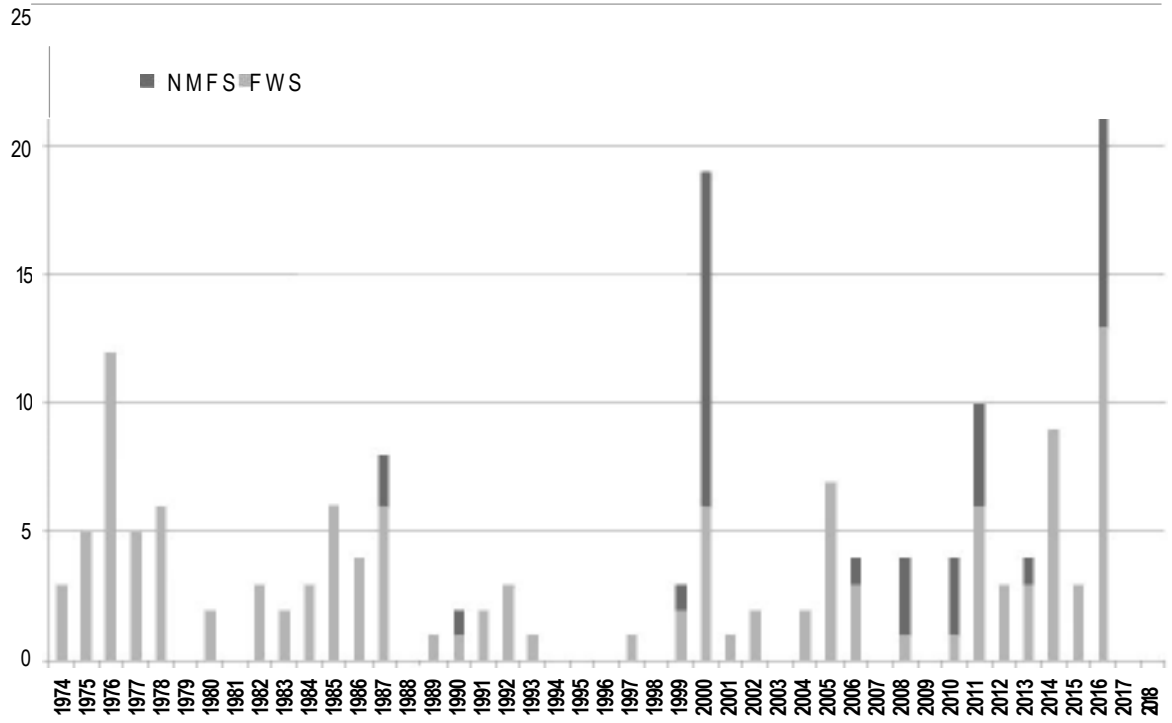
But for other categories of species, I do think withdrawing the §4(d) rule raises some real concerns. In particular, for species that might have benefitted from the §9 "take" prohibition, if FWS doesn't promptly issue a species-specific rule because it's overworked, or it doesn't have enough resources, then we can see a lapse in protection. We can see some lost opportunities for pursuing conservation plans and other conservation measures for those species. So, that's one area of concern for this proposal.

Let me move on to the listing and critical habitat proposals. For listing, the "foreseeable future" definition is an issue that has gotten a lot of attention. Another one is presenting economic and other impacts alongside the final listing decision. A third is setting identical standards for when species are listed and delisted. And the fourth is the triggers for delisting species.

As far as critical habitat goes, I think the two notable proposals are, first, concerning the "not-prudent" determinations—when and how the Services would make those determinations. And second, changing the process for designating unoccupied critical habitat as well as the standards for those designations.

4. FWS & NMFS, CONSULTATION HANDBOOK (1998), *available at* https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

Figure 2. Number of Species-Specific 4(d) Rules by Year

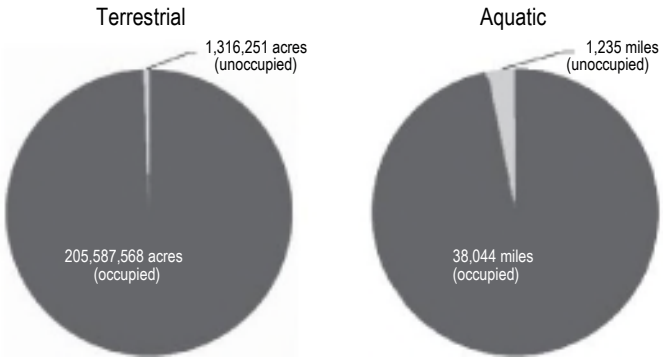


Source: ENDANGERED SPECIES ACT: 2018 ADMINISTRATIVE REFORM—INITIAL PERSPECTIVES ON PROPOSED REGULATORY CHANGES, ENVIRON-MENTAL POLICY INNOVATION CENTER (2018), http://policyinnovation.org/wp-content/uploads/2018/07/ESA-proposals-report.pdf.

In Figure 3, the pie chart on the left, with data taken from FWS, shows the amount of designated critical habitat that was unoccupied from 2007 to the present. Looking at FWS terrestrial critical habitat designations, less than 1% of all the acres seemed to be for unoccupied habitats. So, by and large, occupied habitat took up the vast majority of critical habitat designations.

On the right pie chart, we have FWS aquatic designations. There, roughly 3% of all designations were unoccupied. So, by and large, unoccupied habitat hasn't played a really large role in how FWS has designated critical habitat,

Figure 3.Amount of Designated Critical Habitat That Was Unoccupied (2008-2017)



and the same goes for NMFS.

Source: ENDANGERED SPECIES ACT: 2018 ADMINISTRATIVE REFORM—INITIAL PERSPECTIVES ON PROPOSED REGULATORY CHANGES, ENVIRONMENTAL POLICY INNOVATION CENTER (2018), http://policyinnovation.org/wp-content/uploads/2018/07/ESA-proposals-report.pdf.

In looking at not-prudent determinations that FWS made from 2000 through 2018, my work through the *Federal Register* uncovered only 19 such determinations (Figure 4), many of which were for Hawaiian plants, and very few of which were based on the belief that critical habitat designation would provide no benefits to the species. So, by and large, the Service was relying on the threat of collection or vandalism, or the possibility that the species is already extinct, when making not-prudent determinations.

Finally, I want to point out that the §7 consultation proposals were quite numerous. There are many aspects to them. A few worth highlighting are the redefinition of what it means to "destroy or adversely modify" critical habitat; there are proposals on when consultations will be reinitiated, especially for landscape-level programmatic consultations; there is the rejection of the concept of a "baseline jeopardy" and a "tipping point" in the jeopardy analysis; and there are some proposed efficiencies in drafting initiation packages, for example, by relying on National Environmental Policy Act (NEPA)[5] documentation to reduce the amount of paperwork that the Services and action agencies need to complete as part of the consultation process.

Some topics in the consultation proposals are controversial—for example, no consultations for certain actions that would have global process implications, such as greenhouse gas emissions. And there are a few that are really intriguing, for example the proposal for an optional collaborative consultation process and expedited consultation process.

5. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

Figure 4. Not-Prudent Determinations by the FWS 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 U.S. 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 (Cyanea copelandii ssp. copelandii)	Plant	Likely extinct.
9	2003	Holei (Ochrosia kilaueaensis)	Plant	Likely extinct.
10	2003	Hawai'i pritchardia (Pritchardia affinis)	Plant	Threat from collecting.
11	2003	Lo'ulu (Pritchardia schattaueri)	Plant	Threat from collecting.
12	2003	Lo'ulu (Pritchardia napaliensis)	Plant	Threat from collecting.
13	2003	Wahane (Pritchardia aylmer-robinsonii)	Plant	Threat from collecting.
14	2003	Lo'ulu (Pritchardia viscosa)	Plant	Threat from collecting.
15	2003	Alani (Melicope quadrangularis)	Plant	Likely extinct.
16	2003	Liliwai (Acaena exigua)	Plant	Likely extinct.
17	2003	Lo'ulu (Pritchardia munroi)	Plant	Threat from collecting.
18	2002	Unarmored threespine stickleback	Fish	Pre-1978 listing; not required.
19	2001	Rock gnome lichen	Plant	Threat from collecting.

Source: ENDANGERED SPECIES ACT: 2018 ADMINISTRATIVE REFORM−INITIAL PERSPECTIVES ON PROPOSED REGULATORY CHANGES, ENVIRONMENTAL POLICY INNOVA-TION CENTER (2018), http://policyinnovation.org/wp-content/uploads/2018/07/ESA-proposals-report.pdf.

We didn't see the proposals as offering a lot of details on what this would look like. I'm hoping that our panelists can talk about where they envision that process going and how the process might result in greater efficiencies in a §7 consultation and improve the interactions between action agencies, applicants, and the Services.

So, with that said, I would like to start on a discussion of the §4(d) proposals.

General §4(d) Rules

Jonathan Wood: I think that the §4(d) proposal holds great potential for boosting the rate at which we recover species.[6] My basic view is that the ESA has proven extremely successful at preventing extinction. The statistic you often hear is that 99% of the species that have been listed remain around today,[7] which is extremely encouraging. At the same time, the ESA hasn't had the same success at recovering species. Only about 3% of listed species have recovered to the point they could be taken off the list.[8]

I judge any reform of the ESA by whether it preserves what the statute does well (preventing extinction) while improving the rate at which we recover species by, for instance, providing better incentives for landowners to restore habitat. The §4(d) reform would accomplish this. First, it doesn't disturb the strict regulations for endangered species that have succeeded at preventing extinction. Nor does it change the regulations that apply to currently listed threatened species. Instead, the §4(d) reform proposes to repeal the blanket take prohibition for threatened species in favor of species-specific regulations. I think, depending on how that's implemented, the reform will better align the incentives of landowners with the interest of the species.[9]

By treating endangered and threatened species the same, we make landowners indifferent to the extent of the threats species face. From the landowners' perspective, the same burdensome regulations apply whether the species faces

6. *See* Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC POLICY REPORT (2018), *available at* https://www.perc.org/wp-content/uploads/2018/04/endangered-species-road-to-recovery.pdf (hereafter Wood, *The Road to Recovery*).

7. *See* Lisa Feldkamp, *What Has the Endangered Species Act Ever Done for Us? More Than You Think*, Nature.org (May 8, 2017), *available at* https://blog.nature.org/science/2017/05/08/what-endangered-species-act-done-effective-extinction-conservation/.

8. *See supra* note 6, at 8; Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, *in* REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (2011).

9. *See supra* note 6, at 14-15.

remote risks or is critically endangered and at imminent risk of extinction, which blunts the incentives for landowners to aid in the recovery of species.[10]

If the U.S. Department of the Interior restored the statute's approach of regulating endangered and threatened species differently,[11] as it has proposed, landowners' incentives would be better aligned with the interests of species. If a threatened species declined and was downlisted to endangered, the owner would face much more strict regulation, which would act as a stick. Similarly, property owners would be rewarded for their role in recovering species. When a species' status improves from endangered to threatened, the landowner would face fewer regulatory restrictions, which would act as a carrot to spur proactive recovery efforts.

This reform holds a lot of promise for aligning the incentives to landowners with the interests of species. At the same time, I think there are things we could do to make the reform more effective, both legislatively and administratively. EPIC has proposed several reasonable recommendations that would make the reform more effective at incentivizing species recovery efforts. One change is that we should provide clear and more reliable definitions for endangered versus threatened species. If the regulations turn on that distinction, you're going to see a lot more litigation and conflict there. So, the tighter and clearer definitions we can get, the better.[12]

Another change to the proposal that I think could be helpful is to build in a process to consider what rule is appropriate for each species during the five-year status review process. That would allow the blanket §4(d) rule to gradually sunset, extending the benefits of the proposed reform to all threatened species.[13] And it would allow species-specific rules to be adjusted based on whether the species is improving or declining. Initially, ongoing conservation efforts may indicate that no species-specific rule is required.[14] But the potential that a more restrictive rule may be adopted at a subsequent five-year review could serve as a continual incentive for landowners to participate in such conservation efforts.[15]

There is also a resource question. Species recovery is most likely to be achieved by collaboration between states, property owners, and environmental groups, like we saw employed during the Obama Administration to protect a handful of controversial species, including the lesser prairie chicken, dunes sagebrush lizard, and gopher tortoise.[16] The more we have people collaborating from a species recovery angle rather than fighting over regulatory restrictions, the better chance we have to boost the recovery rate over 3%.

The last thing I'll highlight is a legislative proposal, the Recovering America's Wildlife Act, which paired with the §4(d) reform would enhance the ability of states to recover species.[17] The bipartisan proposal would increase funding for state recovery efforts. The flexibility the §4(d) reforms would give states to use this additional funding presents an opportunity to significantly improve the way we protect, conserve, and recover species.

Steve Quarles: First of all, we've already said that many of these proposed rules really codify existing practices and policies of the Services. This fact is stated frequently in the preambles to the proposed rules. The preambles also cite judicial opinions that the Services think need to be overruled or interpreted by rulemaking. And, of course, the preambles also cite judicial opinions that favor what the Services propose to do either the same or differently in the proposed rules. My first concern is there may be unintended consequences with some of these proposed rules that are not discussed in the preambles. For now, just one unintended consequence is that efforts to implement several of the proposed rules may well invite a surge in litigation even though a major purpose of the proposed rules, mentioned more than once in the preambles, is to reduce the incidence of litigation.

Moreover, a second purpose expressed in the preambles is to overrule certain judicial opinions the Services believe to be erroneous, yet they don't acknowledge that if the opportunity for litigation is increased so too is the likelihood of more "erroneous" rulings. One thing that I find interesting is that the approach of the Services in these proposed rules is quite similar to the approach of Congress in proposing legislation to amend the ESA. After the failure of the Kempthorne-Chaffee-Baucus-Reid bill[18] in the Senate in 1997, which reported from committee but never reached the Senate floor, and the Pombo bill[19] in the House in 2005, which was narrowly passed the House and was never taken up in the Senate, efforts to reform or modernize the ESA through omnibus legislation have been abandoned. Instead narrowly focused bills are now the rage. And, for the most part that can be said of the seven Western Caucus bills and two other bills in the House, and the proposed bill by Senate Committee Chairman Barrasso.[20]

10. *See id.*
11. *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, 28-43 (2015) (arguing that the blanket §4(d) rule violates the Endangered Species Act).
12. *See* Jonathan Wood, *Pacific Legal Foundation Comments on Proposed Revision of the Regulations for Prohibitions to Take of Threatened Wildlife and Plants* (filed Sept. 24, 2018), *available at* https://pacificlegal.org/wp-content/ uploads/2018/10/final-4d-comment-letter.pdf.
13. *See id.* at 12.
14. *See id.* at 8 (analyzing how this would play out for the anticipated listing of the monarch butterfly, in light of the Environmental Defense Fund's ongoing development of a market-based habitat exchange program).
15. *See id.*
16. *See* Jonathan Wood, *Proposed Changes Will Help Recover Endangered Species*, THE HILL (Sept. 24, 2018), *available at* https://thehill.com/opinion/energy-environment/407847-proposed-changes-will-help-recover-endangered-species.
17. H.R. 4647, 115th Cong. (2017); *see also supra* note 6, at 24.
18. S. 1180, 105th Cong. (1997).
19. H.R. 3824, 109th Cong. (2005).
20. H.R. 6356, 115th Cong. (2018) (LIST Act of 2018); H.R. 6345, 115th Cong. (2018) (EMPOWERS Act of 2018); H.R. 6344, 115th Cong. (2018) (LOCAL Act of 2018); H.R. 6355, 115th Cong. (2018) (PETITION Act of 2018); H.R. 6364, 115th Cong. (2018) (LAMP Act of 2018); H.R. 6360, 115th Cong. (2018) (PREDICTS Act of 2018); H.R. 6346, 115th Cong. (2018) (WHOLE Act of 2018); H.R. 6354, 115th Cong. (2018)

The bills are narrowly focused and often would codify or merely tweak existing ESA policies and practices, and, except for the kickers, should be regarded as more evolutionary than revolutionary. What do I mean by kickers? They are the odd, both in number and intent, significantly controversial provisions that appear in the bills—such as exemption of certain Services' decisions from NEPA compliance, shielding of other decisions from litigation, and delegation of multiple decisions to the States without constraints. But those kickers aside, while some of us had half expected that a more conservative administration and Congress might wage war on the ESA by proposing radical regulations and legislation, so far, we've observed not war, but rather a few skirmishes.

With §4(d), the species-specific rulemaking approach may have unintended consequences that could significantly alter the species listing process. I hope I am wrong. But to begin to know that, it would take a deep dive into the §4(d) rules and listing experiences of NMFS, which, as Jake noted, already relies on species-specific §4(d) rules rather than an umbrella, default rule similar to the FWS's existing rule.

Under the species-specific §4(d) rules structure, if a species is to be listed as threatened, then a second, companion rule to the listing rule would have to be prepared unless the species is not to be protected from take at all. And, if critical habitat is to be designated, the rule count for a threatened species listing would total three. To attempt to promulgate simultaneously three rules for each threatened species would be—no exaggeration—a nearly monumental task involving a heavy, if not exhaustive, expenditure of funds and staff time.

With the FWS faced with this workload possibility, my view is that there's a real possibility, if the risks to a species place it on the margin between warranting and not warranting a threatened listing, FWS is likely to be tempted to decide not to list the species, thereby avoiding the need for any of the three rules.

On the other hand, if the FWS thinks that the risks to a species could justify either a threatened or endangered listing, would they prefer to list it as threatened and have to write a species-specific §4(d) rule analyzing and saying what constitutes take for that particular species? Or would they rather just throw it into the bucket of endangered species listings and not have to write any species-specific take rule?

As to the previously mentioned unintended litigation consequence: In accordance with an Executive Order titled Civil Justice Reform,[21] the preambles contain findings that the proposed rules do not unduly burden the judicial system. Maybe this §4(d) rule initiative is not going to unduly burden the judicial system, but it would require a whole new set of additional rules that are open to litigation. You don't need to look any further than the litigation on the northern long-eared bat.[22] It's typical of listing litigation in that it argues FWS should have listed the species as endangered, not threatened. But it also challenges the legal validity of the species-specific §4(d) rule that accompanied the threatened listing rule. As most species-specific §4(d) rules would limit the scope of take for the threatened species they cover, they should be ripe targets for challenge by environmental advocates, with frequent filings of litigation mirroring the northern long-eared bat lawsuit.

In the end, I still think that, if we can avoid the unintended litigation consequences through tighter language in the proposed rule and subsequent guidance and in careful preparation of the ensuing species-specific §4(d) rules, I would certainly favor this proposal. It will ensure that two different levels of protection are provided to endangered species and threatened species, as Congress intended, by not automatically applying the statutory endangered species take prohibition to all threatened species.

And I agree that, through species-specific take prohibitions for threatened species, the FWS can better tailor the dimensions of the take prohibition to the actual risks encountered by, and needs of, the species. Such rules would also provide better guidance and certainty to the regulated community. In the end, ideally, this is a very good rule. I just worry about the unintended consequences possibly providing an open invitation to more litigation.

Holly Pearen: I think Steve is exactly right with respect to the additional resource burdens on the Services, and that is an obvious consequence of this type of proposal. Jake, you may have some thoughts on how you might in fact see a front-loading of the Services' efforts. Maybe this would result in relieving some of the resource needs at the back end on §10 permitting. But I think Steve's unintended consequences are accurate.

Also, with respect to the expected changes versus the codification of existing practice, I think people who value conservation—which is the majority of Americans, including 74% of conservatives[23]—are right to be suspicious of the proposal from the Donald Trump Administration, which has repeatedly disregarded science and logic and data and reason as a basis for decisionmaking.

The Administration's track record on environmental and public health issues explains the deep hesitation and skepticism that environmental groups and others have with this particular proposal, which at face value removes default protections and requires better discernment from

(STORAGE Act of 2018); H.R. 3608, 115th Cong. (2018) (Endangered Species Transparency and Reasonableness Act); Proposed Bill to Amend the Endangered Species Act of 1973 by Senate Environment and Public Works Chairman John Barrasso, *available at* https://www.epw.senate.gov/public/_cache/files/b/9/b99b7ec0-cc53-4051-8827-9a1681602304/FD921A33A08582D2C2C4124BDE001F48.esa-amendments-of-2018-discussion-draft.pdf.

21. Civil Justice Reform, Executive Order No. 12988, 61 Fed. Reg. 4729 (Feb. 5, 1996).

22. Center for Biological Diversity v. Ashe et al., No. 1:15-cv-00477-EGS (D.D.C. filed Apr. 2, 2015).

23. Monica Andersen, *For Earth Day, Heres' How Americans View Environmental Issues*, PEW RESEARCH CEinER (Apr. 20, 2017), http://www.pewresearch. org/fact-tank/2017/04/20/for-earth-day-heres-how-americans-view-environmental-issues/.

the federal agencies that have increasingly made politically driven decisions.

I don't think that simply withdrawing the blanket rule will reduce conflict; I think if the Services don't consistently issue science-based special rules, this proposal will result in a whole new potential suite of litigation around the term "necessary and advisable."

So, to the extent that reducing conflict is a goal, I don't necessarily see this one as accomplishing that. But there is definitely potential here for improvement. That's been an area of consensus—last year, the Western Governors Association recommended that the Services create more certainty around when special rules would be issued and what they might look like. EPIC, the Sand County Foundation, and EDF collaborated to submit joint recommendations to this effect. The suggestions in the form of a letter were filed in a rulemaking docket.[24]

We proposed two action items: first, that the Services should use a semi-quantitative method for classifying threatened and endangered species. As Jonathan pointed out, the withdrawal of the blanket rule will mean that each class will be treated very differently, and making the right determination is more important and likely deserves the more rigorous consistent and predictable method for listing.

The second recommendation we made with EPIC was that the Services should develop national guidance on when and how they formulate species-specific §4(d) rules. A good comparison for the need for this type of guidance is the §10 permitting process. But for these rules, they don't have clear guidance on how or when they'll be developed even though they often allow for similar activity.

So, within that national guidance, the Services should ideally clarify the following. First, there should be a standardized process for issuing §4(d) rules. NMFS has a standard approach. Jake, I think, could explain this very well. He has done extensive research on the NMFS process. But it clarifies expectations and streamlines the agency workflow.

The second recommendation for these guidelines that EPIC and EDF made was that they should identify how and when take prohibitions would apply, and focus take prohibitions on activities that meaningfully imperil or impede recovery, not necessarily inconsequential or de minimis action.

The third recommendation for the guidelines we made was that they should establish a preference for allowing activities to benefit survival or recovery or that have no known harmful effects or only trivial effects.

Fourth, we suggested that the Services outline the criteria that they will use to evaluate such programs so that those expectations are clear at the outset. Also, two recommendations we made were that guidance should incorporate avoidance, minimization, and offset measures so that species under a §4(d) would be no worse off than if covered by a §10 agreement.

Finally, we recommended committing to the use of science-based metrics to evaluate habitat or population impacts of those expected activities. I'll let Jake speak further to that recommendation for guidance. But I will say that without a clear expectation and a framework for science-based decisionmaking, the withdrawal of the blanket rule will weaken protection for species.

Dave Owen: I am interested in Steve's fears about perverse incentives. I suppose the concern I would have is that there just won't be §4(d) rules—that is, species-specific §4(d) rules for species listed by FWS —because the easiest path is simply to list the species and not do a §4(d) rule at all. And that then has a variety of different effects, as Jonathan's report[25] states. I recommend reading it.

As his report points out, there's less of a penalty for landowners who have endangered species on their land. On the other hand, that means less incentive to do habitat conservation plans (HCPs), it means less leverage for the Services if they do decide to negotiate a species-specific §4(d) rule, and it means that the §9 prohibition isn't doing as much work through consultation processes, which is where most of the leverage under §9 actually comes from. It's hard to know how those effects are going to balance out. My intuition is that it's a net loss for protection.

Species Listing and Critical Habitat

Dave Owen: On the listing of critical habitat, there are a couple of changes here, as Jake explained at the outset. Some of them are adjusting listing practice, and some of them are creating a somewhat different area of emphasis in the words, but not really constraining behaviors such that those things have to be done differently.

To give a little bit of context, one of the things Jake mentioned is that not a whole lot of unoccupied critical habitat has been designated, and the vast majority of designated critical habitat has been occupied. A slight qualification to that is that I had a research assistant spend some time looking at designations from the past several years and she did find an uptick in unoccupied area designations during the later years of the Obama Administration. As Jake pointed out, it's still not a very large percentage at all of overall designations, but it is a little bit more of a trend.

Jake Li: I will actually just echo that point. The data I got that gave rise to the pie charts was from FWS. They also break down the acres of unoccupied habitat by year. There is a slight uptick also during the Obama Administration. So, I think that's consistent with what your research assistant found. It raises a question of whether that pattern would continue if the unoccupied critical habitat proposal

24. Letter to Secretary Zinke From EPIC, EDF, and Sand County Foundation, Considerations on Withdrawing the Default 4(d) Rule Under the Endangered Species Act, *available at* https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-ES-2018-0007-0004&attachmentNumber=1&contentType=pdf.

25. *Supra* note 6.

were to actually be codified right now, or whether the trend would go in the opposite direction. Great point.

Steve Quarles: The proposed rules would have the Services analyze the economic impacts of a species listing and then make that analysis available to the public before the listing occurs. But then, even though they possess the analysis, they commit to not using it in the listing decision, as they should, since Congress required that listing decisions be made on the basis of best scientific and commercial data available and then reaffirmed that requirement by later adding the word "solely" to it.

But can the Services truly avoid the temptation to refer to the economic data while engaging in the listing decisions? And even if they do, won't the decisions likely be tainted anyway by stakeholders' suspicions that the Services did succumb to that temptation? Moreover, the Services could be flooded with economic arguments and cost data during the listing decision process in efforts to influence the economic impacts analysis, presumably heightening those suspicions.

I've never favored the lonely 10th Circuit precedent that the Services should consider the costs of the listing decisions when conducting the economic analysis required for critical habitat designation decisions.[26] But if push comes to shove, I'd much rather have the Services opine on the economic cost of listing in a totally separate rulemaking—the critical habitat designation rule—and not packaged with the listing rulemaking, to greater segregate the listing economic impacts analysis from the listing decision. My choice is to honor the sole statutory requirement for economic analysis found in the ESA's critical habitat designation provisions and not encumber, in fact or by conjecture, the listing process.

As for the "foreseeable future" issue, the Services say the impacts to be considered must be measurable, but they are not clear what they will be measured by—profes-sional judgment and/or models. For most of us who have practiced in the endangered species arena, we occasionally shudder when the Services say "professional judgment," but these days I can feel paroxysms of concern when they mention models. These models—e.g., the presence/absence models, including the evidence of absence model, and the species equivalency analysis model, habitat equivalency analysis model, and collision risk model—have significant problems. They are largely opaque; are rife with assumptions, some disclosed, some not; and are so starved for data to operate they become reliant on poor or outdated data. And not only do the models have these problems, but it's very difficult for the public to discover or fully understand how they work.

Unfortunately, the Services seem to view any objections to or questioning of the use of their models to border on blasphemy, thereby burying practitioners' concerns. This is particularly likely when the Services are working on habitat conservation plans, because, for example, frequently the projects' take levels produced by the models are incredibly high, triggering the need for overly expensive mitigation measures.

I only see one problem with the delisting factors. I am sad that the Services propose to consolidate the various factors into one. Of most concern for me in my practice is the prospective loss of the separate delisting factor of "error in the original listing." Because the Services propose to eliminate it as a separate factor, the result will be that, if they discover an error, either by petition or by themselves, they would have to undertake an analysis of all five factors that gave rise to the original listing. This means the Services cannot move more quickly to delist because of an acknowledged error in the original listing and avoid the multi-year delisting process. That's unnecessary work and unfortunate.

I'm concerned about the test for designating unoccupied critical habitat. I am pleased that the Services proposed restoration of the sentence that was eliminated in the 2016 critical habitat rules that said, basically, before you designate any unoccupied habitat you must determine that designation of solely occupied habitat is inadequate for conservation of the species. But they do add a somewhat mystifying new standard for designating unoccupied habitat: would designating only occupied habitat result in "less efficient conservation"?

The Services did not attempt to provide an overarching definition of what constitutes efficient conservation, and that is problematic. Clearly, so subjective a standard for designating unoccupied habitat might reopen problems which both the timber companies in the *Weyerhaeuser* case before the Supreme Court[27] and the Services in these proposed rules are attempting to remedy designations of critical habitat of land or water that is not occupied by the listed species, does not harbor features and resource values that would invite or permit occupation, and could be rendered habitat suitable for occupation only with expensive dedication and restoration of private property by landowners who have no intention and cannot be required to do either. So, will this proposed rule's "less efficient conservation" standard propel us back into the unoccupied habitat litigation mire that the *Weyerhaeuser* case was expected to resolve?

Interestingly, although the 2016 critical habitat rules authorized more liberal designation of unoccupied habitat, the expansive critical habitat decision being litigated in the *Weyerhauser* case was not made under those rules, but instead in reliance on the preexisting 2012 critical habitat rules. Clearly, the Services understand this, and if the government is successful in defending that critical habitat decision, any new rules to limit the authority to designate unoccupied habitat would need to overcome both the 2016 and 2012 rules. (Yes, the Solicitor General is defending the broad critical habitat decision before the Supreme Court at

26. New Mexico Cattle Growers' Ass'n v. U.S. Fish and Wildlife Serv., 248 F.3d 1277 (10th Cir. 2001).

27. Weyerhaeuser Company v. U.S. Fish and Wildlife Service, No. 17-71 (2018).

the same time the Services are proposing rules that would moot it. I believe the Services have anticipated this possible litigation outcome and need, and intend, the proposed rule to do just that.)

Jonathan Wood: I agree with a lot of what Steve said. One particular benefit of the proposed reform would be to avoid the *Weyerhaeuser* problem—the designation of land that is currently unsuitable for a species, where such designation is likely to alienate the landowner to such an extent that the land will never become habitat.[28] That's a situation that should frustrate everyone because it generates lots of conflict, without benefitting the species.

My PERC colleague, Tate Watkins, recently wrote an article[29] contrasting the experience of the landowners in the *Weyerhaeuser* case and The Nature Conservancy, which is trying to recover the dusky gopher frog on its own property in Mississippi. The article speaks to just how difficult it is to restore habitat and recover species like the frog. The Nature Conservancy has constructed a sophisticated lab to rear tadpoles, released thousands of them, and conducted controlled burns on the property. Fourteen years into the impressive effort, the dusky gopher frog population on The Nature Conservancy's land is approximately 50 frogs.[30]

Thus, restoring habitat and recovering species like the dusky gopher frog is long and difficult work, even in the best of circumstances. Thus, it's important to question how likely it is that the designation of the land at issue in *Weyerhaeuser* is to lead to such effort. In other words, how likely is it that a landowner will be so grateful for a regulation that may impose as much as $30 million in regulatory burdens that he will voluntarily undertake the sorts of efforts The Nature Conservancy has?[31] To ask such a question, is to answer it.

It is interesting that the Services continue to defend the *Weyerhaeuser* case while also changing the regulations to prevent this sort of conflict in the future. I hope Steve is right that they see the writing on the wall and think the Supreme Court will essentially dictate that land that isn't habitat shouldn't be designated as critical habitat where it seems clear that the designation will all but ensure that the land will never be converted into habitat.

At the Pacific Legal Foundation, we represent a lot of landowners involved in that case, so we certainly welcome that outcome. In fact, 20 states appear to support that outcome, based on their amicus brief in *Weyerhaeuser* and their filing of a lawsuit against the 2016 rule that would have made such designations more common.[32] Jake is right that unoccupied critical habitat has consistently been a small fraction of total designated critical habitat, with lands unsuitable as habitat a still significant smaller fraction. So, whether such lands can be infrequently designated may not be the biggest endangered species issue, especially once the 2016 rule is repealed, but it nonetheless highlights how, too often, the implementation of the ESA leads to conflict rather than focusing on whether the proper incentives are being created to restore habitat and recover species.

Holly Pearen: With respect to the §4 proposals on critical habitat, the statute continues to require that critical habitat designations, like every other FWS decision, remain rooted in best available science, and the critical habitat of the nation is fundamentally based on the biological and physical features needed by species.

The proposed discretionary factors were not prudent decisions. They seem to insert very qualitative assessments, which if relied upon excessively will hinder recovery potential and potentially invite litigation. I think some of those factors will lack any data and we'll see also a discretionary best professional judgment that may, contrary to the intent, continue the sort of concept with the nature of designation.

I think the overall impact of the proposed regulation is intended to be and will be to restrict habitat designation. This means overall size and perhaps volume and number of those designations. This won't solve the problem at all. It might temporarily reduce conflict or consternation from a few landowners, but it would dramatically reduce recovery potential, prolong ESA management. I think it falls into the trap of assuming that development and economic opportunities and conservation are in conflict, and that's just not true.

Finally, as a side note, I find it interesting that FWS proposed these regulations. Under a 2009 M-Opinion,[33] then-Solicitor Bernhardt argued persuasively that the secretary had very broad discretion to exclude certain areas, some critical habitat designation. Then, many of the factors proposed in this rulemaking could be appropriately incorporated in an exclusion analysis. So, it's very interesting to me that they proposed to do this via regulation.

With respect to some of the specific discretionary factors they proposed, I think establishing a preference for designating critical habitat on public land first will have an unintended consequence of proportionately shifting the burdens of conservation on ranchers, foresters, and concessionaires to depend on public land to make their living on grazing permits, for example, and, frankly, the private landowners that will still be included in critical habitat designation. From 70% to 90% of the said species depend on privately held land. No matter what discretionary factors are introduced, private landowners will be and must

28. *See id.*; *see also* Jonathan Wood, *The Feds Bungle Frog Hospitality*, WALL ST. J. (Sept. 30, 2018), *available at* https://www.wsj.com/articles/the-feds-bungle-frog-hospitality-1538329013.
29. Tate Watkins, *If a Frog Had Wings, Would It Fly to Louisiana?*, 37 PERC REPORTS 26 (2018), *available at* https://www.perc.org/2018/07/13/if-a-frog-had-wings-would-it-fly-to-louisiana/.
30. *See id.*
31. *See supra* note 28.
32. Br. of Alabama and 19 Additional States, Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv., No. 17-71 (U.S. filed Apr. 30, 2018); *see* Amanda Reilly, *States Drop Suit as Trump Admin Reopens Habitat Rules*, E&E News (Mar. 16, 2018), *available at* https://www.eenews.net/stories/1060076609/.
33. U.S. Department of the Interior, Office of the Solicitor, M-37021, The Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act (Jan. 16, 2009), *available at* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37021.pdf.

be part of the recovery and conservation effort and will be included in critical habitat designations.

Designating occupied habitat first and then unoccupied, I think, faces some challenges, because the same Services released an opposing policy just two years ago and explained in that rulemaking that the rigid two-step process that the jury now proposes led to inefficient outcomes and didn't serve the recovery goals of the species. In reversing that policy, especially in such a short time frame, the Services are going to see a heightened burden to explain their new position over and above the normal "rational basis" standard. And that's Supreme Court case law from *Motor Vehicle Manufacturers Ass'n v. State Farm*.[34]

So, I'm interested to see what their hard look reveals because they are going to need to do a better job than just to say that they've learned more in two years than the Services did in almost 20 years before their previous policy was introduced.

With respect to the other components of the proposal on "foreseeable future," I think it's fair to say the EDF anticipated a very different and substantially worse proposal. We are actually pleased to see that the proposed rule is basically a restatement of the 2009 M-Opinion and largely a reflection of current best practice, which will allow the Services to continue to use climate models as best available science. A suite of cases affirm this and also affirm the Services' authority to rely on models. It may not be perfect as long as they do represent best available science.

I think the proposal may not add much clarity to those seeking it because it does use terms like "probable," which in a legal sense is very vague, but does have specific meaning in a scientific context. I think to be more workable and clear, we would recommend that the Services continue to clarify the approach in this area by using a quantitative approach to define the risk of extinction and uncertainty in existing data in any analysis.

The Intergovernmental Panel on Climate Change, for example, has defined the terms for translating statistical and probabilistic outcomes into terms understandable by lay people, such as "likely" and "very likely." Those definitions do add clarity and help the public and regulated community understand how to translate models and scientific quantitative approaches into a decisionmaking context.

With respect to the proposal to remove language on referencing economic and other impacts, I'm not sure what to say here. We know that Service staff worked really diligently on some of the reform proposals and made efforts to improve how the ESA is implemented and received by the regulated community and clarified this in practice. We also know that some of their proposals are just overtly political additions.

Practically speaking, I think it would be incredibly wise for the Services to actually conduct such regulatory impact analysis during listing decisions even if they remove that regulatory language first. It's not going to change the statutory prohibition on considering costs and benefits during listing decisions. The statute will continue to prohibit that.

Then each time the Services perform a regulatory impact analysis during listing, that's going to be a hook for litigation and will undermine and delay decisionmak-ing, which is the opposite of what Americans want for the ESA. I think this is even more true because the Services didn't propose to do it for every single decision or for listing, which invites the speculation that it will be for political purposes or some other reason.

I do think challenges to listings that include this type of regulatory impact analysis are likely to be successful given the great expense and time federal agencies spend in court arguing that collecting information about the impacts of a federal action and analyzing those impacts and that information and presenting it to the public itself constitute consideration under NEPA and other statutes. So, EDF is normally a huge supporter of quantitative analytical decisionmaking and robust cost-benefit analysis. In the case of a listing, it's a violation of the statute and just incredibly impractical.

Jake Li: I want to connect one thing you said to something Steve said, which is the issue of discretion in a foreseeable future analysis. I think both of you have agreed that there really isn't much change in practice if the current proposal for a foreseeable future would be codified.

However, the underlying root of the problem is that there's a lot of discretion as to how to interpret terms like "probably" or "reliable." And there doesn't seem to be any solution on the table that the agencies have offered for how to tackle that problem. So, if they finalize the foreseeable future proposal, we might expect to see still quite a bit of variance in how the agencies treat "foreseeable future" and, as a result, increased litigation and controversy over that matter.

So, with that said, I would like to turn to §7.

Section 7 Consultation

Dave Owen: There's a lot about consultation in the proposed regulations. I'm going to zero in on four features that I think are particularly interesting and important. These include, first, the addition of the words "as a whole" to the adverse modification standard; second, the language in the preamble that rejects the concept of baseline jeopardy— in other words, a point where the species is bad enough off that anything that makes it worse off would constitute jeopardy; and third and fourth, two other provisions, which might initially seem unrelated to each other, for programmatic consultations and expedited consultations.

One thing to know at the outset is that there's nothing new here. All of what I'm going to be talking about is continuous with policies or approaches that have more or less been in place for many years—some of them in good ways, some of them, I think, very problematic. So,

34. 463 U.S. 29, 13 ELR 20672 (1983).

these are important parts of the regulations, but not drastic policy shifts.

With adverse modification, and with jeopardy as well, the basic issue that the Services are confronting is what to do when a proposed federal action is going to hurt species a little bit. In other words, the action is going to make a shift to a species' habitat that makes the species noticeably worse off, but it's not on its own a major change. For a long time, the Services' approach has been to say that's not jeopardy and it's not adverse modification.

That's something that environmental groups and others have pushed back against. And the Services have gotten there with adverse modification by using their regulations and the consultation handbook to add words like "considerable" or "appreciably diminish" as modifiers to "adverse modification," all as a way of saying that not just any negative changes counts as adverse modification. With jeopardy, their general approach has been to say even if the species is in rough shape, it's not necessarily jeopardizing to make it a bit worse off.

With adverse modification, I think there are a couple of problems with that approach. One is I don't think it's legal. The statute doesn't have those modifiers in it. It just says "adverse modification." It puts the Services in a weird position of saying, well, sure, it's a noticeable adverse modification. In fact, they'll often say modifications are big enough to cause take, and yet they say it's not adverse modification within the meaning of the statute. Just from a textual perspective, it's weird. And then the other problem is that a lot of species are endangered in large part, or threatened in large part, by these incremental shifts. Writing those incremental shifts off means you're often not dealing with the primary threats to a species.

So, what should the Services do? I think there is a sensible approach, if you're going to try to avoid the real transactional and regulatory cost of dealing with these little paper cut-scale impacts—and some of them are bigger than paper cuts. We've seen biological opinions, let's say 4,000 linear feet of alteration of a stream, that are not treated as an adverse modification even when it makes it clearly worse. But some of them really are paper cuts.

The way to deal with it, ideally, would be as part of a larger plan. You develop a recovery plan. You develop a species-specific §4(d) rule that identifies conservation approaches that are ambitious enough to compensate for the little injuries that you're going to try to avoid regulating. Or you use things like compensatory mitigation systems. You compensate for those small injuries in a way that's more efficient than individualized regulation.

So, that's where two of the proposals in the rule are actually kind of intriguing. One is for programmatic consultation to allow for that sort of larger scale thinking, and the other is for expedited consultations, which would basically mean using a fairly standardized set of mitigation measures or project exchanges to get something through consultation very quickly and also provide law protection advice. Both of these things have already happened; the proposal here is just to codify them and make them a bit more standardized.

The catch is there's really no detail in the proposed rule explaining how that's actually going to be done. The Services basically throw out these concepts that, I think, are potentially appealing but then provide no real standards to define them. The proposed rule seems to suggest that expedited consultation will be done project-by-project, or, maybe, for groups of projects. That could work out well, but it would be nice in the rule to make this somewhat more robust.

Jake Li: For those who have not read Dave's law review article[35] on regulating small harms, it's one of the most insightful articles I've seen about this issue of how the Services address adverse modification. Next, I'd like to turn it over to Jonathan to provide some perspectives.

Jonathan Wood: I think this is one of the areas where most of the big proposals are left pretty vague and so there's the greatest opportunity for commenters and experts to weigh in and influence the final outcome. The one aspect I'll stress, and some of the other panelists might also talk about it, is clarifying when formal and informal consultation begins. It's been one of the major sources of conflict with the regulated public for a while.[36]

The Services are proposing to establish a deadline for informal consultation, like it has for formal consultation. But if you're going to have a deadline, the most important question is the point from which it runs. In the past, the agencies have delayed consultation significantly by making several demands for additional information, all before concluding that the application is complete and the clock has begun to run.[37] So, to the extent people have ideas on how the Services can clarify what's required to have full complete submission, I think that's going to be a big opportunity to influence the final outcome here.

Steve Quarles: I'm going to talk about a couple of things. First, programmatic consultation. Let me fall back on unintended consequences. I serve as counsel to a cohort of wind energy companies that will need eventually to participate in the type of programmatic consultation endorsed in the proposed rules. We are working on two programmatic HCPs that would support programmatic incidental take permits (ITPs) for new and existing wind projects in two multi-state regions.

The industry is seeking to address wind development in these two regions through the programmatic ITPs to avoid the substantial cost in time and resources of preparing individualized HCPs and applying for project-specific

35. Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FlA. L. REv. 141 (2012).

36. *See* Jonathan Wood, *Testimony Regarding ESA Consultation Impediments to Economic and Infrastructure Development to the House Committee on Natural Resources Subcommittee on Oversight and Investigations* (Mar. 27, 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941086.

37. *See id.*

ITPs for most of the hundreds of projects that will be erected in each region in the next 15 years. Before either programmatic ITP could be issued, programmatic consultation would be necessary even without the proposed rules, and that highlights a possible unintended consequence. Which is that, during the course of the programmatic HCPs negotiations, FWS came to the unsurprising conclusion that each programmatic ITP would cover projects which might pose different risks and, if they are all addressed in that HCP/ITP, the avoidance, minimization, and mitigation measures would need to be sufficiently stringent to offset the impacts of the highest risk projects, potentially leaving the lesser risk projects with punitive conservation requirements.

The unintended consequence is that many planned projects that would be caught in this one-size-fits-all conundrum no longer plan to apply for take authorization through a programmatic ITP. Instead they will revert to preparing site-specific HCPs and applying for site-specific ITPs, thereby foregoing programmatic consultation and seeking instead project-specific consultations, even with the consequent cost escalation. From the experience of these two examples, the benefits of programmatic consultation may not prove to be as plentiful and generous as the Services suggest and the programmatic consultation provisions in the proposed rules may not be as popular as hoped.

I think there should be careful consideration of the Services' request for comments on whether the scope of consultation should be limited to only activities, areas, and effects that are within the jurisdictional control and responsibility of the action agencies. Of course you know that's been a huge problem with Clean Water Act (CWA) §404 programs.[38] The FWS thinks that, for pipelines and other linear projects undergoing consultation, the action agency must analyze instream and upland effects over the entire project length. On the other hand, the U.S. Army Corps of Engineers (the Corps) believes it must analyze effects only where it has CWA jurisdiction—the stream crossings—and need not do so for project elements and their effects between crossings or upland from the riparian areas. Through a 2016 exchange of letters, referred to as an "agreement in principle," FWS and the Corps committed to seek a solution to this decades-old problem. The solution they appear to have found for now is that FWS will provide analysis for the entire project area, but will state in the biological opinion that the Corps would be responsible for reasonable and prudent measures or reasonable and prudent alternatives only for the stream crossings.

If the project developer wishes incidental take protection over the entirety of the project or any area outside of the stream crossings, it will have to seek the incidental take authorization separately from the FWS, presumably through an HCP and ITP application. This resolution of the §404 issue may presage a decision for the final rule of focusing consultation only on decisions and areas where the action agencies have jurisdiction.

38. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

I become a bit confused over the Services' suggestion that their proposal for expeditious consultation is a new formal consultation process. The only thing I can find new in the proposal is that the action agency and the Services can agree on a more expedited time frame. There's nothing else. No new procedures; nothing else that will make it any different from our existing consultation processes.

I am particularly interested in what seems to be the codifying of the *Washington Toxics* case.[39] The existing regulations do allow for counterpart rules, which are rules that would set up new procedures for consultation rather than those that we're all used to. As is noted in the preamble, agencies with their own expertise on wildlife may be able to analyze the effects on listed species as well as or better than the Services.

There was an agreement on a counterpart rule that provided for consultations on pesticide registrations. Under that rule, as promulgated, the U.S. Environmental Protection Agency (EPA) could undertake informal consultation by itself, without going to the Services for concurrence. And the Services, in formal consultations, could agree to take the risk analyses that EPA has done for registration and simply adopt all of it or part of it as their biological opinions. Well, the first part, arguing no need for EPA to engage in informal consultation on a registration and secure concurrence of the Services in its no adverse effects finding, was found to be legally invalid in *Washington Toxics*. But the last part, authority of the Services to adopt EPA risk analyses in biological opinions on registrations during formal consultations, was found to be valid.

However, efforts by the pesticide industry and EPA to try to get the Services to adhere to that still valid formal consultation portion of the pesticides registration counterpart rule have been for naught. I believe very recently, some 10 to 11 years after *Washington Toxics,* EPA and the Services have agreed to conduct one of their consultations in accordance with that surviving portion of the pesticides registration counterpart rule. What I find interesting is that despite this reluctance of the Services to employ the pesticide registration counterpart rule, with the proposed rules the Services have exhibited a newfound respect for counterpart rules by proposing to facilitate the use of counterpart rule procedures.

The existing §4(d) rule in the current regulations requires that each action agency/Services counterpart agreement must be codified in a program-specific counterpart rule, while the proposed rule would allow the counterpart agreements to stand without the necessity of framing them in program-specific counterpart rulemaking. This approach would eliminate the rulemaking burden and ensure a great savings in time and effort in developing and implementing counterpart consultations.

Finally, there is the issue of the *Cottonwood* case[40] on reinitiation of consultation. The Services are siding against

39. Wash. Toxics Coal. v. Envtl. Prot. Agency, 413 F.3d 1024 (9th Cir. 2005).
40. Cottonwood Environmental Law Center v. U.S. Forest Service, 789 F.3d 1075 (9th Cir. 2015).

the court ruling on the necessity to reinitiate consultation on Forest Service land use plans when a new species is listed or new critical habitat is designated. The proposed rules provide that federal land management agencies do not have to reinitiate consultation on their completed programmatic land use plans whenever a new listing or designation occurs. This would seem to be all well and good. Consultation will still occur, as the actions that are authorized by the plans will be the subject of consultation or reinitiation of consultation that will consider the actions' effects on the newly listed species or designated critical habitat.

But the next step is more problematic. In the preamble, the Services flirt with the possibility of employing the ESA §7(a)(1) consultation process for agency programs in lieu of the §7(a)(2) consultation process for agency actions. Well, that could be discomfiting, at least to the regulated community. That's because the standard under §7(a)(2) is avoidance of extinction, whereas the standard under §7(a)(1) is recovery of the species. The Services don't acknowledge the heightened standard in §7(a)(1).

Questions and Answers

Jake Li: We'd like to turn it over to questions and answers now. We've had a few questions about how will FWS have the resources to write species-specific §4(d) rules? I will offer a quick perspective. I frankly don't know the answer to that question other than to say that if FWS would issue those §4(d) rules concurrent with the listing decision, there might be some efficiencies.

I think the other important question out there, and this one I really don't have an answer to, is that FWS really could save some time by not having to review the ITPs for activities that would no longer be prohibited under §9. So, it's a very tricky balance because if you have some activities that really only have de minimis effects on species recovery, then those might be opportunities to have an exception under the new rule and save the workload to review and approve ITPs. But how much money does that really save on the part of the Services versus the amount of time it takes to write a §4(d) rule? That's something I would love to see FWS offer a little bit of guidance or perspective on.

Jonathan Wood: My answer is the same, it depends on how the Services do it. But I do think it will be wise to fold the process into something else the Services are already doing. Jake is right that §4(d) rules have become more common in the past few years and many of them have been built into the listing process itself. I think the two opportunities where the Services should be considering whether and to what extent to regulate take of a species are the listing process and five-year status reviews, the latter because, with time, you might find that a species-specific rule needs to be strengthened to encourage more conservation. But I think Jake's right. If §4(d) rules were a completely separate process on their own time line, it would require a lot of agency time and resources. Fortunately, that need not be the case.

Jake Li: A related question on §4(d) is how a lot of the benefits that we've talked about in terms of doing species-specific §4(d) rules, in theory, can already be accomplished through the default rule. Maybe another question for you, Jonathan, and for anyone else. Are there any specific advantages that you can see coming out of eliminating the default §4(d) rules and issuing rules on a species-by-species basis? For example, in the past, the Services didn't have to think or deliberate about how to tailor protection by default, but now they'll be forced to do so, right? Are there any potential benefits that you can see to this new approach?

Jonathan Wood: I think there are two. First, the default rule has effectively required all of these collaborations and conservation plans to be developed during the window between when a listing is proposed and a final decision is made.[41] During the Obama Administration, for instance, the development of pre-listing conservation plans was rushed. In fact, these ambitious plans could only be developed for species whose listing was warranted but precluded.[42]

Eliminating the blanket §4(d) rule in favor of species-specific rules would allow more species to benefit such efforts, by permitting the FWS to go ahead and list a species as threatened while delaying the adoption of any take regulation while a collaborative conservation plan is developed. Simultaneously, the agency can make clear that the decision will be reconsidered at the next five-year status review. If the conservation plan is showing promise, no species-specific §4(d) rule may be required. If the species is declining, however, the agency will adopt a §4(d) rule. This would preserve flexibility, while retaining the threat of a future rule to incentivize participation in conservation efforts.

The second benefit of repealing the blanket §4(d) rule I'll highlight is the concern of backsliding, which has frequently expressed by environmental groups.[43] Pre-listing conservation planning makes the outcome of a listing decision both extremely important and extremely controversial. If a species is listed, property owners who previously participated in the conservation effort may be resentful. And, if the species isn't listed, there's a concern that the incentive for landowners to continue participating will evaporate. The §4(d) reform would solve this problem by allowing species to be listed as threatened without sacrificing state and private parties' flexibility to develop conservation plans. And because the species has been listed, the potential for species-specific regulations

41. *See supra* note 6, at 21.
42. *See supra* note 12, at 7-8.
43. *See, e.g.*, Emily Sohn, *A Grand Experiment on the Grasslands*, Biographic.com (Mar. 13, 2018), *available at* http:// www.biographic.com/posts/sto/a-grand-experiment-on-the-grasslands (quoting Jake as asking "What incentive is there to enroll if there isn't a threat of listing?").

of take would serve as a continual incentive to follow through on these plans.

Jake Li: I'd like to turn to §7 now. We've had a few questions on the use of compensatory mitigation or offsets to try to expedite consultations. That's related to the expedited consultation proposal. It's related to what Dave said earlier about the potential use of mitigation to offset small harms, especially if it could be done at a certain point. Then some of the questions pertain to specific examples that any of you can provide of where the use of mitigation might result in better consultations.

Another question I want to add is that there appears to be some evidence of skepticism about the use of compensatory mitigation under the current U.S. Department of Defense (DOD). So, how much do you see that affecting the idea of using mitigation as a flexibility tool to avoid more draconian and drastic outcomes in consultations?

Steve Quarles: First of all, I think that may be nothing but a speculative question. Yes, this Administration has said that mitigation is nothing more than a regulatory form of extortion of developers. And, it has acted on this position by withdrawing the 2016 mitigation policies for FWS, BLM, ESA, and Candidate Conservation Agreements. Accordingly, mitigation may not remain a major aspect of ITPs and other §10 permits or be a factor in §7 consultations on those permits.

The practitioners who are representing project applicants typically emphasize to the Services that they cannot propose mitigation in formal consultations. The Services are free only to recommend minimization measures. The word "mitigation" is not found in §7, instead it provides that incidental take statements may only include measures to minimize the impacts of a take. However, as is recognized in the preamble of the proposed rule, applicants may voluntarily offer to include mitigation measures in their project proposals, and are likely to do so if they believe the measures are needed to avoid a jeopardy finding. These are called mitigated projects or mitigated agency actions.

By and large, the regulated community is happy with the absence of mitigation in formal consultations. But many in the community are not happy with the possibility that the FWS could restrict the use of mitigation in ITPs and other §10 permits. In §10, unlike §7, ESA calls for both minimization and mitigation measures. And in many cases mitigation measures have proven to be substantially less costly than minimization efforts. When that is the case, project developers do not regard mitigation measures as extortionate and welcome the opportunity to mitigate.

Dave Owen: When I was doing my research, I had an interesting conversation with an NMFS biologist in the Pacific Northwest who told me that with repeat player agencies—and he was specifically thinking of the Corps—it's actually fairly routine for them to negotiate standardized mitigation packages. Not necessarily compensatory on-site mitigation, but standard packages of measures that they would use to reduce impacts for similar and recurring projects. He was a big fan of it. He said you would get a much better consultation, a much faster consultation, because of it. And because NMFS was offering speed and certainty, the Corps and applicants were willing to adopt some pretty strong protections for species. He saw it as a big win-win.

As to the second part of your question—whether a whole lot of compensatory mitigation advances are going to happen under the current Administration—it's really striking that there's a mention of offsets at all in the proposed §7 rule when so much of what the Administration is doing, including pulling back on the BLM compensatory mitigation policy, so much of it is hostile to compensatory mitigation. So, I'm not optimistic with this Administration. It takes hard work and you really have to invest a lot of planning to do compensatory mitigation well. To say that's not currently a priority is, I think, an understatement.

Jake Li: I guess we'll look to see whether the use of offsets appears in the final rule. The Services might get comments on that issue.

Another set of questions that have come up pertains to what it means for there to be "efficient" conservation. This is your remark earlier, Steve, about it being vague. It gets to the point of how do you do better species conservation, reduce the sociopolitical cost of conservation, and ensure that the money being used for conservation achieves the most bang for the buck. Do any of you have ideas or examples as to how the Services can try to balance those three sometimes competing objectives in your work?

I would say oftentimes there are multiple paths to recovery. It's not just one particular strategy that gets the species through recovery. We might have multiple configurations of different populations. If the Services are giving a nod to that concept—let's say you have three options for recovery and now they're very explicit as to which one can produce or generate the least cost on the part of landowners—you still get the species to long-term viability and it is a good investment of resources. Maybe that's what the Services had in mind. But if that's what they have in mind, one, they haven't talked about that in the background to the proposed rule, and two, I think the agencies would really need recovery plans that very clearly describe all the different options and which one the Services intend to pursue in light of this economic balancing.

Holly Pearen: It's a great question on efficient conservation, and a difficult one. As an attorney at EDF, I spend most of my time working with a team of scientists and economists to figure out ways to make conservation more likely to occur and to incentivize recovery for imperiled species. I think if more discussion were around opportuni-

ties to make conservation more efficient, we'd be a whole lot closer to the bipartisan discussions that led to the birth of the ESA than where we are now sort of entrenched in this very partisan debate. I would really rather see more thoughtfulness around that type of question than around arguing about frankly many of the proposals in the Trump Administration's reform package.

Dave Owen: Jake, I'll add on your question. I think what we were just talking about with large-scale planning compensatory mitigation is not a new formula. But that done well, that is a way to get some of the efficiency you're talking about.

Jake Li: What did you not see in this rulemaking package that you would have liked to have seen?

Holly Pearen: I don't know that we anticipated much positive development out of the Administration that has such disregard for science.

Jake Li: I think given all the criticism about how the ESA does not achieve enough recoveries and has not engaged landowners more, I was somewhat disappointed to see not as many, really almost no, private landowners, state landowners center-based policies or regulations here. That's a recurring theme we see on the Hill, we see in the dialogue around the ESA. There just really isn't much of anything here.

Jonathan Wood: I agree. I think what's most interesting about this proposal is that, whether intentionally or not, it's not going to please either extreme. The people who would say any change to the ESA is "gutting the statute," the people who say no change is far enough, neither of those groups is going to be happy with these reforms. But there is an opportunity here for DOD to find a moderate middle ground. Between the two extremes of this long-running debate, there is a lot of opportunity for the rest of us to work together on bringing states into the process more as partners in conservation. Similarly, there's a lot of upside by reconsidering the incentives we're creating for landowners to either destroy habitat or restore it.

I would have loved to have seen some specific request for commenters to think creatively and propose ways to get more incentivized conservation into these changes. That's the real key to improving the rate at which we recover species. I think one of the other panelists mentioned that most species depend on private land for the vast majority of their habitat, which is true. Due to that fact, recovering species ultimately comes down to a question of landowner incentives. Until we get those incentives right, we're not going to get recovery rate that people want.

Dave Owen: Someday, I would love to see a rulemaking or a legislative change that links the recovery planning process to efforts to solve this difficult question of how much harm is jeopardy, how much harm is adverse modification.

Steve Quarles: What I would look for, I'm afraid, may not be done except legislatively. That is, I would have welcomed an effort to postpone critical habitat designations to the recovery planning process. I am concerned that trying to identify critical habitat at the same time that you're working on the listing criteria and thus engaging in two rule-makings concurrently within a tight, statutorily prescribed time frame likely overtaxes the Services and could well result in less-informed listing and designation decisions that are vulnerable to litigation. The Kempthorne-Chaffee-Baucus-Reid bill would have required postponement of critical habitat decisions until recovery planning.

But, I might add that ESA critical habitat provisions were eliminated entirely in the Pombo bill. Of all people, Rep. George Miller (D-Cal.), the most environmentally oriented congressman, spoke and voted in favor of removing all critical habitat provisions from the ESA in committee markup of the Pombo bill. That was unpopular among environmental advocates because those provisions are the only place in the statute where habitat is mentioned and accorded explicit protection, and among some in the regulated community because those same provisions are the only place in the statute where economic impacts are acknowledged and the Services are required to analyze them. Since critical habitat is defined in §3 of the ESA as containing features or an area essential for conservation of the species, critical habitat should be designated when species conservation is studied—at the recovery planning stage.

Holly Pearen: I think the conversation around creating economic opportunities and incentives for private landowners is one worth exploring. I think there are certainly opportunities to see environmental benefits and economic opportunities co-exist. The other panelists have suggested really rich opportunities to do that.