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Proposed Action Memo: DOI Endangered Species Act Rollbacks

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I. Summary

In 2019, two federal agencies (the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA)) promulgated significant changes to the regulations implementing the Endangered Species Act (ESA), the primary legal tool for protecting biodiversity in the United States. These regulatory changes could significantly weaken the protections for endangered species, particularly with respect to climate change. The agencies have also proposed additional changes to regulations implementing the ESA, and have resisted listing new species under the Act.

Rollbacks

- U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020 (Aug. 27, 2019) (final rule)
- U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44976 (Aug. 27, 2019) (final rule)
- U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 27, 2019) (final rule)
- U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 85 Fed. Reg. 47333 (Aug. 5, 2020) (proposed rule)
- U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 55398 (Sept. 8, 2020) (proposed rule)

Agencies

- U.S. Fish & Wildlife Service, National Oceanic & Atmospheric Administration

Impact

- Significantly broadened agency discretion to avoid consideration of climate change impacts on endangered species and to minimize consideration of threats to species on the edge of extinction—**potentially leaving endangered species more vulnerable to extinction.**
- Eliminated default protection for threatened species from harm from private actors — **potentially weakening protections for many species.**
- Allowed presentation of economic factors in deciding which species warrant protection and proposed deferring to outside actors as to designation of critical habitat—**potentially allowing species to be left without protection where powerful economic interests are in opposition.**

Proposed actions

- **Petition for abeyance and voluntary remand in current litigation.**
- **Issue policy statements indicating agency intention to replace regulations.**
- **Initiate rulemaking processes to replace the 2019 regulations with new regulations that better implement the Act.**

II. Justification

The United States, like the rest of the world, faces a biodiversity crisis as species and ecosystems decline because of human activities and development. The Endangered Species Act is the preeminent statute in the United States for the conservation of biodiversity. The Act currently protects well over 1,000 species from extinction, and there are likely hundreds more that require protection under the Act. Species in the United States face increasing threats, particularly from climate change and destruction of their habitat. The Act has also been a political flash point for conservative and property-rights activists—driven in part by the potentially substantial impacts of regulation under the Act on landowners. Finally, there are important ways in which the operation of the Act could be improved, including by more effectively harnessing cooperation by private landowners to improve habitat for endangered species.

The prior administration has avoided an aggressive implementation of the statute—it has refused or delayed listing for hundreds of species that likely require protection under the Act. Most significantly, in 2019, it promulgated substantial revisions to the regulations implementing the Act, revisions that would work major changes in the extent to which the Act protects biodiversity in the United States.[1] Restoring effective implementation of the Act and reversing the problematic components of the 2019 regulations, while also taking proactive steps to improve how the Act operates, should be the primary initial focus of the new Administration. This memo also provides guidance as to additional initial steps the new Administration can take to restore effective implementation for the Act, including revoking additional rules changes proposed by the prior administration, accelerating the listing of species for protection under the Act, ensuring effective cooperation with landowners, and addressing the threats of climate change to endangered species.

III. Overview of Act and Current State

There are five key provisions of the act. Section 4 develops a process for identifying, or "listing," species for protection under the Act.[2] Species may be listed as either endangered or threatened. Section 4 also requires the designation of critical habitat for listed species.[3] Section 7 prohibits federal agencies from taking any actions that would jeopardize the existence of a listed species or adversely modify its critical habitat; it is implemented through a process by which federal agencies consult with FWS and NOAA.[4] Section 9 prohibits anyone from "taking" a listed species;[5] "take" is defined in the statute to include harm, which under the implementing regulations can include certain forms of modification of the habitat of a listed species.[6] Section 10 creates a permitting process for authorizing take in certain circumstances, most importantly in the context of

[1] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020 (Aug. 27, 2019); U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44976 (Aug. 27, 2019); U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 27, 2019).

[2] 16 U.S.C. § 1533

[3] 16 U.S.C. § 1533(b)(2)

[4] 16 U.S.C. § 1536(a)(2)

[5] 16 U.S.C. § 1538(a)(1)(B)

[6] 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3

actions that would incidentally take a listed species.[7] Section 11 authorizes suits by private parties to enforce the Act against other private parties, and to force the government to implement mandatory duties under the Act.[8]

Overview of the 2019 Revisions to the ESA Regulations

One basic theme stands out in the 2019 revisions to the regulations—they effectively give the implementing agencies (FWS and NOAA) broad discretion to avoid providing important protections to listed species. In particular, the revisions allow the agencies to sidestep the threats that climate change poses to biodiversity in the United States, even though climate change is already one of the most important threats to biodiversity.

Economic impacts of listing: For listing, the first major change is one that removes language from the prior regulations that explicitly prohibited the agencies, when they are deciding whether to list a species under the ESA, from considering "possible economic or other impacts" of that listing decision.[9] The statute requires the agencies to make listing decisions "solely on the basis of the best scientific and commercial data available," language that is understood to exclude considerations of economic impacts of listing decisions.[10] (The legislative history on this is quite clear.) The revised regulation simply repeats that statutory language.[11] However, in proposing and finalizing the change, the agencies made clear that they are eliminating the explicit prohibition on conducting economic analyses in the regulation to allow the collection and dissemination of economic data analyses for listing decisions.[12] The agencies acknowledged repeatedly that they still can't consider those economic impacts in the listing decision itself, which raises questions about why they are opening the door to presenting a futile economic analysis. The best guess is that the agencies hope that by presenting economic analyses that show the impact of listing decisions, they can create political pressure to stop listing decisions (perhaps through Congressional action), even if they can't legally refuse to list themselves. In other words, the goal appears to allow the agencies to do extra work even though they are required by statute to ignore the products of that extra work

Listing threatened species: The second major listing change relates to threatened species, which are listed if they are "likely to become an endangered species within the foreseeable future."[13] The revised regulations define "foreseeable future" as "only so far into the future as the [agencies] can reasonably determine that both the future threats and the species' responses to those threats are likely,"[14] a standard that will be applied on a "case-by-case" basis using a "more likely than not"

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7 16 U.S.C. § 1539(a)
8 16 U.S.C. § 1540(g)
9 U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193, 35194-95 (July 25, 2018) (proposed rule); 84 Fed. Reg. at 45052 (amending 50 C.F.R. § 424.11(b)).
10 16 U.S.C. § 1533(b)(1)(A).
11 See 50 C.F.R. § 424.11(b)
12 See 83 Fed. Reg. at 35194-95.
13 16 U.S.C. § 1532(20)
14 See 50 C.F.R. § 424.11(d)

threshold.[15] The additional definition is likely most important for species which will be harmed by climate change, and gives the agencies the ability to avoid listing species as threatened because of climate change threats.

Designating critical habitat: The next major change relates to the designation of critical habitat. Under the Act, the agencies must list critical habitat occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection."[16] The agencies also may designate unoccupied critical habitat if the agency determines that the habitat is essential for the conservation of the species.[17] In a recent Supreme Court decision, the Court held that unoccupied critical habitat must be "habitat," without defining the term[18] the 2019 regulations require that unoccupied critical habitat must have "reasonable certainty" that the "area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species."[19] Both the requirement for "physical or biological features" and the "reasonable certainty" standard are new additions, and will make it harder to demonstrate that a currently unoccupied area is important for future conservation of the species something that could be quite significant given that unoccupied areas may be important for species that move their ranges in response to climate change.

Finally, with respect to critical habitat designation, the Act allows the agencies to avoid designating critical habitat for a listed species if designation is not prudent.[20] The agencies revised how they define "not prudent" in the regulations to include situations where "threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2)."[21] As discussed below, this could likely include harm from climate change.

Take of threatened species: For the regulations implementing take under Section 9, FWS revised the regulations to allow take for threatened species unless the agency issues a species-specific regulation providing take protections for that species. Under the Act, endangered species automatically receive full take protections under Section 9, but threatened species do not.[22] Section 4(d) of the Act does allow the agencies to write regulations that provide for the full protection of species against take under Section 9,[23] and historically FWS has had a blanket, default rule that all threatened species receive full take protections, unless a regulation specifically changes those rules for a particular species. It was this blanket rule that the 2019 revisions changed.[24] This change poses the risk of allowing newly listed threatened species to go without significant protections unless the

15 See 84 Fed. Reg. at 45020-21.
16 16 U.S.C. § 1532(5)(A)(i)
17 16 U.S.C. § 1532(5)(A)(ii)
18 See Weyerhauser Co. v. U.S. Fish and Wildlife Service, 139 S. Ct. 361 (2018)
19 50 C.F.R. § 424.12(b)(2)
20 16 U.S.C. § 1533(a)(3)(A)
21 50 C.F.R. § 424.12(a)(1)(ii)
22 See 16 U.S.C. § 1538(a)(1)
23 See 16 U.S.C. § 1533(d)
24 See 84 Fed. Reg. 44753

agencies affirmatively act to protect the species—something that may be difficult to do in an era when the agencies' budgets are always seriously constrained.[25]

Section 7 consultation: Most complicated, and perhaps most significant, are the changes to the regulations implementing Section 7. This memo only summarizes the most important changes to Section 7 processes and standards there are a significant number of minor and moderate revisions that occurred. Some of these less significant changes involved efficiency improvements to the administration of Section 7 that are conservation neutral, and therefore are changes that the new administration might wish to retain.

Of the major revisions, first the regulations would generally make it harder to attribute impacts to actions by a federal agency by both requiring a showing that the impacts purportedly caused by the proposed federal agency action are demonstrated by "clear and substantial" evidence and are "reasonably certain" to occur (effectively applying a proximate cause standard).[26] These changes would make it easier for an agency to avoid finding a climate change impact from a proposed federal agency action, and thus avoid Section 7 for the action.[27]

The revisions to the regulations would also potentially expand the scope of what federal agency actions are categorized as nondiscretionary, and therefore are excluded from Section 7.[28] They would give agencies broader freedom to identify what they considered to be nondiscretionary components of actions they would take, and therefore exclude the impacts of those nondiscretionary components from their Section 7 analysis. As an example, federal operation of dams on the Columbia River is a major threat to endangered salmon runs in the Pacific Northwest, but the operating agencies have argued that running the dams is required by statute, so the impacts of those operations should not be considered under Section 7.

The last major revision relates to the prohibition on adverse modification of critical habitat. Here the regulations build on prior changes to the definition by the Obama administration, but push them even further. The Obama administration revised those regulations to bring them into compliance with judicial interpretations of the Act that required a more robust definition of "adverse modification" of critical habitat. In the course of making those revisions, the Obama administration required that for changes to habitat to qualify as adverse modification, they must "appreciably" impact critical habitat,[29] effectively creating a *de minimis* standard for adverse modification. The revision by the prior Administration builds on that language by also requiring that

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25 The agencies refused to specify a timeframe within which they would issue a 4(d) rule, though to this point in time all 4(d) rules promulgated under the new regulations have been timely.

26 See 50 C.F.R. § 402.02 (defining effects of the action); id. at § 402.17 (defining "reasonable certainty"). "Reasonable certainty" was used as a standard in the agencies' handbook implementing Section 7, though without definition, and only for a limited subset of Section 7 consultations. The new definition in Section 402.17 is quite strict, and appears to apply to the full range of Section 7 consultations.

27 The agencies disclaimed that this was their intent and that this would be the impact of the changes in their explanations of the new regulations. 84 Fed. Reg. at 44995. The changes would also make it easier for an agency to avoid finding impacts from other causes besides climate change.

28 The Supreme Court has held that actions that federal agencies do not have discretion to undertake are not covered by the jeopardy and adverse modification prohibitions of Section 7, drawing in part on existing regulations implementing the Act. See National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007)

29 See U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered and Threatened Wildlife and Plants; Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7214 (Feb. 11, 2016)

adverse modification means impact to critical habitat "as a whole"[30]—such that even significant impacts to only a small portion of the habitat would not count as adverse modification.

As part of its discussion in the preamble of the changes to the adverse modification definition, the agencies indicated in both the proposed and final rules that they were rejecting interpretations of the Act that required the agencies to consider in their Section 7 analyses whether species might face "tipping points" i.e., whether small impacts to a species might push the species onto a trajectory towards extinction. Relatedly, the agencies rejected judicial interpretations of the Act that Section 7 consultation should consider whether species are already in jeopardy, and that, if species are already in jeopardy, agencies should prevent any additional negative impacts on species.[31]

Additional Regulatory and Policy Changes

Two additional rule changes were proposed in September 2020. One would create a definition of the term "habitat," to address the Supreme Court decision in *Weyerhauser* that designated critical habitat must contain habitat.[32] The definition requires that an area have "existing attributes that have the capacity to support individuals of the species."[33] While general, this language might be interpreted to prevent the designation as critical habitat areas that could be suitable for a species with restoration or as a result of future climate change.

The other would revise and codify the process by which FWS decides whether to exclude areas from designation of critical habitat pursuant to Section 4(b)(2) of the Act[34]—that provision allows the agencies to exclude areas from critical habitat if the benefits of exclusion outweigh the benefits of inclusion. The proposed rule would require the agency to consider excluding areas from critical habitat if "credible information" is provided by a party supporting exclusion of part of critical habitat.[35] It would also require the agency to defer to the "expertise" of outside parties such as tribes, local governments, and private actors with respect to the evidence they provide about the benefits of excluding areas from critical habitat.[36] The agency then would balance the information about benefits of exclusion with the benefits of inclusion. The process laid out by the agency creates a risk that the agency will allow outside actors to demand exclusion analyses, and then defer to the requests by those outside actors for exclusion of areas from critical habitat, again reducing the scope of Section 7.

Another significant change in the proposed regulations for excluding areas from critical habitat designation is a reversal of a prior agency policy that generally avoided excluding from critical habitat areas that are located on federal lands. The proposed regulation would consider exclusions on federal lands similar to exclusions elsewhere.[37] This could have a significant impact on Section 7,

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30 See 50 C.F.R. § 402.02 (defining adverse modification). The "as a whole" language was in fact in the preamble of the Obama Administration regulations, and therefore does have strong connections to those past revisions.

31 See 84 Fed. Reg. at 44985-88; 83 Fed. Reg. 35182-83.

32 U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 85 Fed. Reg. 47333 (Aug. 5, 2020)

33 Id. at 47334

34 U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 84 Fed. Reg. 55398 (Sept. 8, 2020)

35 Id. at 55407

36 Id.

37 Id.

since it only applies to federal actions, and all or almost all actions on federal land would qualify as federal actions.

Addressing the Backlog of Listed Species

The prior administration was exceedingly reluctant to list species for protection, and has been sued many times over that reluctance. Species have gone extinct waiting for protection under the Act, and listing species earlier can make it easier to keep those species from going extinct and easier to ultimately recover those species. ("Recovery" is defined under the Act as bringing a species to the status where it no longer requires protection under the Act.) The prior administration also has mostly failed to implement a workplan to take action on hundreds of species awaiting a decision on whether they warrant protection under the Act.[38] Action to accelerate listing and address this backlog should be a high priority for the next administration.

Landowner Incentives

Cooperation by private landowners is a vital component of successful ESA implementation. Most species have at least some habitat on private lands, and some have all of their habitat on private lands.[39] For many species, simply prohibiting harm by private landowners is not enough to prevent extinction or ensure recovery. For instance, active habitat management by landowners may be required to ensure that habitat is maintained or improved.[40] However, if only regulatory penalties for landowners are available under the Act, then landowners have no incentive to improve habitat—habitat improvements might increase the number of listed species on their property, increasing their regulatory burdens. Indeed, some landowners may respond to the regulatory burdens of the Act by illegally destroying habitat or individual members of listed species—actions that are extremely difficult to detect and enforce against.[41]

The agencies have developed a suite of programs designed to adjust the regulatory structure of the Act in order to improve incentives for landowners. A major benefit that many of these programs provide is regulatory certainty—if a landowner takes specified steps, they will know what regulatory obligations they will face in the future and will not face additional burdens. This regulatory certainty can be an important motivator for landowners, given the ambiguities of the regulatory coverage of the Act. One example of this is the "no surprises" policy, by which landowners who receive incidental take permits under Section 10 of the Act are generally guaranteed that they will face no additional regulatory obligations other than those they already face under their permit.[42] Another program seeks to use regulatory certainty to encourage landowners to take proactive measures to

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[38] The workplan is here: https://www.fws.gov/endangered/esa-library/pdf/5-Year%20Listing%20Workplan%20May%20Version.pdf

[39] Donald C. Baur, Michael J. Bean, and William Robert Irving, A Recovery Plan for the Endangered Species Act, 39 Envtl. L. Rev. News & Analysis 10006, 10008 (2009); see also Daniel M. Evans, et al., Species Recovery in the United States: Increasing the Effectiveness of the Endangered Species Act, Issues in Ecology No. 20 at p. 14 (Winter 2016)

[40] Baur, Bean, and Irving, supra note 39, at 10008.

[41] Paul Henson, Rollie White, and Steven P. Thompson, Improving Implementation of the Endangered Species Act: Finding Common Ground Through Common Sense, 68 BioScience 861, 864 (2018)

[42] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8859 (Feb. 23, 1998)

assist species that are not yet listed—the candidate conservation agreement with assurances program by which landowners (and non-federal public entities) that take steps to protect species before they are listed for protection under the Act are given guarantees that they will not face any regulatory burdens beyond those in the agreement if the species in question is actually listed.[43] Finally, the safe harbor program provides that landowners that take affirmative steps to improve the habitat for listed species on their lands will not face additional regulatory restrictions because of those efforts.[44]

Climate Change

Climate change is one of the most important threats facing endangered species. However, there are real challenges as to the extent to which the Act may be able to address climate change. Species can, and have, been listed for protection under the Act, primarily because of climate change threats. But it is unclear whether actions that produce greenhouse gas emissions would be covered by Section 7 (if they were federal) or Section 9 (if they occurred by any party). By contributing to climate change, these actions surely are contributing to the eventual jeopardy of species listed because of climate change, are contributing to adverse modification of those species' habitats, and are contributing to climate change that is causing harm to listed species. For instance, a federal permit for an oil refinery, or leasing of federal land for coal mining, would produce greenhouse gas emissions that arguably should be analyzed under Section 7. The operator of an oil refinery or a coal mine is contributing to greenhouse gas emissions that potentially may be a take under Section 9. However, none of these actions—even the largest oil refinery or coal mine—is a large contributor of greenhouse gas emissions considered at a global scale, and the impacts of those actions are distributed broadly across the entire planet.

The nature of the causal relationship between greenhouse gas emissions and harm to biodiversity raises questions about the utility of the Act in directly addressing climate change. First, legally it is possible both that the causal relationship between greenhouse gas emissions and harm to species does not meet a proximate cause standard, and that standard is required for the applicability of both Section 7 and Section 9.[45] If so, greenhouse gas emissions may not even be covered under the Act. Second, administratively trying to use the Act to regulate the vast number of activities in the United States that produce greenhouse gas emissions is daunting, even if the range of regulated entities is limited to only very large emitters. And third, politically covering greenhouse gas emissions by the Act could be very volatile.

On the other hand, environmental groups might use the Act's citizen suit provision to try and force agencies to address climate change, potentially pressuring the agencies into making difficult decisions about whether and how to use the Act to address climate change. One plausible option might be to refuse to use the Act to regulate greenhouse gas emissions, but instead to list species that are harmed by climate change and use the Act to address other threats these species face. These kinds of management efforts, by reducing the impacts on species by other threats, can make species

[43] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Candidate Conservation Agreements with Assurances Policy, 81 Fed. Reg. 95164 (Dec. 27, 2016)

[44] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Safe Harbor Agreements and Candidate Conservation Agreements with Assurances; Announcement of Final Safe Harbor Policy; Announcement of Final Policy for Candidate Conservation Agreements With Assurances; Final Rule and Notices, 64 Fed. Reg. 32705 (June 17, 1999)

[45] The Supreme Court has made clear the proximate cause standard does apply to Section 9. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

more resilient and adaptable to changing climatic conditions.[46] In addition, the Act can facilitate affirmative efforts to facilitate species adaptation to new climatic conditions, such as by protecting future habitat through critical habitat designations, facilitating transfer of individuals and populations to help species shift their ranges, and more.

In any case, the new administration will likely face increasingly difficult choices. Even without litigation, climate change will increasingly make conservation and recovery of listed species challenging.

IV. Proposed Actions

Revoking and Revising Provisions of the 2019 Regulations

The first step in revoking the 2019 regulations should be to identify them as priorities for change in any early Executive Order addressing environmental issues—this can be followed by a policy statement by the agencies that they will be proceeding to revoke and revise the 2019 regulations pursuant to the Order.

These public statements by the new administration can be relied upon by DOJ in its resolution of ongoing litigation challenging the 2019 regulations. Specifically, the new administration can ask courts hearing litigation with respect to the 2019 regulations to hold the cases in abeyance while the agencies revisit the underlying regulations.[47] The abeyance serves multiple purposes: saving judicial resources from involvement in a potentially moot matter; protecting the Justice Department from having to change litigation positions prior to issuance of a new rule; and protecting the agency's new rule against potential decisions in favor of the prior rule. Following the petition for abeyance, the agencies should petition the court for a voluntary remand of the 2019 regulations, which would return them to the agency in advance of any decision on the merits. A voluntary remand would give the agencies time to complete new regulations.

The policy statements should also indicate generally which provisions of the 2019 regulations might be kept by the new administration, and which provisions will be revoked—particularly if the agencies decide to promulgate new provisions simultaneously with the revocation of the 2019 regulations (as discussed below).

Following is a list of the provisions of the revised regulations that most warrant revocation or revision, in order of prioritization.

- Switching the default role to no take for threatened species: As noted above, this presents a real risk that threatened species will receive no protection. It should be reversed.
- Collecting and presenting economic analyses of the listing of species: This is information that cannot be used to inform the listing decision under the Act, and therefore is a waste

[46] See J.B. Ruhl, Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future, 88 Boston Univ. L. Rev. 1 (2008).

[47] Bethany Davis Noll and Richard L. Revesz, "Regulation in Transition," 104 Minn. L. Rev. 1 (2019), pp. 24-28; Cole Jermyn and Laura Bloomer, "How to Undo the Trump-Era Regulatory Rollbacks to Redo Environmental Protection," Harvard Law School Environmental & Energy Law Program (April 23, 2020), p. 5, available at http://eelp.law.harvard.edu/wp-content/uploads/How-to-Undo-the-Trump-Era-Regulatory-Rollbacks-to-Redo-Environmental-Protection-FINAL.pdf.

of agency resources. It also can create an opening for political pressure against the listing of species that require protection.

- Adding heightened causation standards to Section 7 consultation: These changes make it harder to protect species from harms caused by federal actions, particularly those harms that relate to climate change.
- Rejecting greater protection of species that already face jeopardy: The preambles to the proposed and final regulations provide an interpretation of the Act that would allow federal agencies to take actions that, albeit individually small, would significantly increase the risk that species would go extinct because those species are already on the edge of extinction.[48]
- Increasing the burden for listing threatened species: The regulations arguably set a higher standard of proof for establishing that a species is "likely to become an endangered species within the foreseeable future" such that it can be listed as threatened. A higher standard of proof will make it harder to list species that are impacted by climate change and therefore warrant protection under the Act.
- Increasing the scope of what kinds of actions might be considered nondiscretionary and therefore excluded from Section 7: This change will make it easier for federal agencies to avoid the jeopardy and adverse modification restrictions of Section 7.

As noted above, while the revised ESA regulations present some serious concerns as to the implementation of the ESA, not all of the provisions of the revised regulations are problematic. In addition, the issues that the revised regulations seek to address—most importantly, the impact of climate change on endangered species—are important ones that are not adequately addressed under the current implementation structure for the Act. Thus, the new administration should not just revoke the revised regulations without a plan for future, beneficial revisions. Two issues are particularly important for consideration for future revisions: the definition of "foreseeable future," and the use of Section 4(d) regulations.

The definition of "foreseeable future" is the timeframe that is to be used by the agencies in assessing whether a species is in danger of becoming endangered, such that it should be listed as a threatened species. The agencies had not previously defined the term in the regulations, though an Interior Solicitor's memo stated that the term covered timeframes in which predictions would be "reliable".[49] The vagueness in the term has given the agencies broad discretion in deciding whether a species warrants protection as a threatened species. However, the question has become increasingly high-stakes, frequent and disputed for a number of related reasons.

First, listing species as threatened has become increasingly important in the implementation of the Act because the agencies have increasingly relied on 4(d) regulations that tailor take protections for threatened species. (Section 4(d) regulations are only available for threatened species.) The

[48] Because this interpretation of the Act was only in the preambles, and was not directly associated with changes to regulatory language, the agencies may be able to reverse this position with a policy guidance statement or interpretative rule that need not comply with the full scope of procedural requirements for an informal rule.

[49] U.S. Department of the Interior, Office of the Solicitor, Memo M-37021, The Meaning of "Foreseeable Future" In Section 3(20) of the Endangered Species Act (Jan. 16, 2009)

agencies have relied on these 4(d) regulations in part to provide incentives for landowners to protect species and in part to address political or other objections to species listings.[50]

Second, climate change is by nature a long-term and ongoing threat—as a result, it particularly implicates questions about how far in the future the agencies' analysis of threats to species should go, and how reliable that analysis should be. Lawsuits have challenged agency determinations that species are, or are not, threatened species, and the agencies have lost a number of those cases.[51] Providing greater clarity around the meaning of threatened species could reduce litigation, provide more guidance and transparency to outside parties, and also reduce the risk of inconsistent and inadequate application of the standard by future Administrations. One option recently proposed is to use the year 2100 as the date for assessment of the impacts of climate change for species, given that is a widely used date in most climate projections.[52] This could be included as part of a revised regulatory definition of "foreseeable future."

Another key question relates to the use of 4(d) rules. As noted above, FWS has increasingly used special 4(d) rules for threatened species to create incentives for landowners to protect species and their habitat or address political or landowner objections to the listing of a species. Section 4(d) has therefore become an increasingly important provision of the Act, but the agencies have never articulated a standard for its implementation. The Act allows section 4(d) rules to protect a species against take when "necessary and advisable" for the protection of a species, but those terms have never been defined by the agencies. Such a definition could again reduce inconsistencies, provide transparency, and prevent future abuse of the use of 4(d) rules. The definition should at least specify that actions that interfere with the recovery of a listed species are regulated, and those that advance the recovery of a listed species should generally be exempted.[53] The agencies should also consider using policy guidance to articulate a public process for developing these rules, similar to the handbooks used for developing HCPs, and to develop standards for evaluating the effectiveness of 4(d) rules and applying adaptive changes to those rules to address problems.[54]

Addressing the Proposed Regulations

If the regulatory changes proposed in September 2020 are finalized, the new administration may wish to revoke or revise them. A definition of "habitat" may be required given the Supreme Court decision in *Weyerhauser* but the definition in the proposed regulations is overly narrow, and does not adequately consider the possibility of restoring currently degraded habitat or of habitat shifting in response to climate change. Any final definition should consider area as habitat if there is a

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50 Robert Fischman, Matthew Castelli, and Vicky Meretsky, Collaborative Governance Under the Endangered Species Act: An Empirical Analysis of Protective Regulations, 38 Yale J. Regu. (forthcoming 2021) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685885

51 See, e.g., Center for Biological Diversity v. Everson, 2020 WL 437289, no. 15-CV-477 (D.D.C. Jan. 28, 2020); Defenders of Wildlife v. Jewell, 176 F.Supp.3d 975 (D. Mont. 2016).

52 Ya-Wei Li, et al., Species protection will take more than rule reversal, 370 Science 665 (2020); Robert Fischman, Matthew Castelli, and Vicky Meretsky, Collaborative Governance Under the Endangered Species Act: An Empirical Analysis of Protective Regulations, 38 Yale J. Regu. (forthcoming 2021) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685885

53 Ya-Wei Li, et al., Species protection will take more than rule reversal, 370 Science 665 (2020)

54 Robert Fischman, Matthew Castelli, and Vicky Meretsky, Collaborative Governance Under the Endangered Species Act: An Empirical Analysis of Protective Regulations, 38 Yale J. Regu. (forthcoming 2021) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685885

reasonable chance that the area can be restored in the future, such that individuals of the species can use the habitat.

The proposed revisions for the process for considering exclusions from critical habitat have serious flaws, and create the possibility of allowing outside actors to drive FWS's critical habitat designation process. In addition, the change in the presumption about the inclusion of federal lands in critical habitat will undermine the effectiveness of conservation on federal lands. These provisions should be replaced. The agencies may well have to create a process to determine whether to conduct an exclusion analysis under Section 4(b)(2), since the decision whether to conduct such an analysis is reviewable under the Supreme Court's *Weyerhauser* decision. A new process for making that decision will need to be included in any replacement regulations. Steps to replace these regulations can be similar to those as for the 2019 regulations, above.

Addressing the Backlog in Listed Species

This is a pressing matter, given the backlog and the importance of ESA protections for listed species. And it can be entirely addressed administratively. The main constraint is resources. Listing actions can be expensive, and can take up funding that is important for protecting and recovering already listed species. For many years, the agencies have successfully requested that Congress cap the amount of their funds they spend on listing species the rationale for the cap is that otherwise citizen suits by environmental groups to force listing decisions might eat up a large portion of the agencies' budgets needed for other activities. In the past, the agencies have looked for efficiencies in listing species by, for example, identifying species whose habitat overlaps or that have similar habitat requirements, bundling those species together into multi-species listing packages. The agencies could continue to use this approach to improve effectiveness in listing species. They may also consider asking for the cap on funds spent on listing decisions to be significantly raised. Finally, political appointees in the prior administration impeded listing decisions even when resources were available—political appointees in the new administration could expedite listing decisions where resources are available, with the goal of returning to the original timetable for the listing workplan.

Addressing the Need for Landowner Incentives

Providing significant financial incentives for landowners would generally require legislative action. However, additional administrative steps could be taken to try and advance landowner incentives for protecting endangered species and their habitat. One option that can be done administratively, though it would take more resources, is to provide greater assistance and outreach to landowners about how to comply with the Act and avoid regulatory obstacles. Another option would be to do a close review of existing procedures for approvals of safe harbor agreements, CCAAs, and similar programs to determine whether there are ways to make it easier for landowners to enter into the agreements without sacrificing important species protections.

Addressing Climate Change

Finally, the agencies will need to continue to navigate the challenges that climate change presents both to endangered species and to the Act. One option would be to continue to avoid making

findings that greenhouse gas emissions from projects are covered by Section 7 and 9 without undertaking the kinds of sweeping regulatory changes that the prior Administration attempted. For instance, the Obama administration maintained a 4(d) rule for the polar bear that generally exempted greenhouse gas emissions from the scope of Section 9 take protections for that species. However, this approach may become increasingly difficult to pursue as more species are listed or threatened by climate change, and as litigation increases. A second option would be to seek some sort of legislative solution—gaining exemptions for greenhouse gases from the Act in return for some additional protections for species in general, or as part of a broader climate change package in Congress. A third option would be to attempt to use Section 10 permits and Section 7 review on a programmatic level to address climate change—for instance, creating a generic charge per ton of greenhouse gas emitted that is used to support protection and recovery of listed species threatened by climate change. This last approach is possible administratively, but would raise a range of difficult legal and practical issues. A final option—the most feasible in the short-run—would be to aggressively use the range of tools the agencies have under Sections 7 and 9 to address other, non-climate change threats to listed species to increase their capacity to adapt to climate change, and to use Sections 7 and 9 to facilitate efforts such as assisted migration and protection of future habitat for species.

V. Risk Analysis

Most of the proposals in this memo are well within the authority of the agencies under the Act, and as long as they are properly supported in the administrative record, should receive deferential review in any litigation challenge.

In general, revoking and revising the 2019 regulations will be a relatively safe step to take. It can be done in either one step (revoking problematic provisions of the prior rule and simultaneously providing new revised provisions) or in two steps (revocation, returning the regulations to their pre-2019 status, followed by new provisions where warranted). The one-step approach presents fewer opportunities for litigation for opponents (only one regulatory change). However, it would likely take more time to prepare, and would in the meantime allow the 2019 regulations to continue to be in force. In addition, there is an argument that revision of the regulations requires environmental review under the National Environmental Policy Act, which could take time—NEPA compliance for revocation of the 2019 regulations alone would probably be easier than NEPA compliance for new revised regulations. Finally, as noted above, many of the changes in the 2019 regulations give the agency broader discretion. Accordingly, the new administration could implement the 2019 regulations in a conservation-protective manner while it updated the regulations.

Alternatively, the two-step approach would likely more quickly erase the 2019 regulations, but probably take longer to produce new regulations that address key issues that require improvement, such as 4(d) implementation. The first step likely would have much easier NEPA analysis (since it is returning to the prior status quo). The agencies could also rely on a range of procedural arguments (such as inadequate public consultation in the issuance of the 2019 regulation, or inadequate NEPA analysis) to support revocation of at least some of the provisions of the 2019 regulations.[55] The

[55] The 2019 regulations were promulgated in three separate rules. The rule for the changes for take protections for threatened species was the shortest rule, and the least likely to have significant procedural issues with its promulgation. Revocation of that rule may require relying more on substantive objections to the rule. The other rules had more significant procedural issues and therefore could more easily be revoked based simply on procedural objections.

agencies could then move to do updates to the regulations that address key issues, without worrying that litigation or delay over those updates would interfere with repeal of the 2019 regulations.[56]

Litigation over repeal of the 2019 regulations would likely ensue, but would generally be unlikely to ultimately succeed. There was a lawsuit challenging the old FWS regulation providing default take protection under 4(d) for all threatened species—that lawsuit would likely be revived if the take provisions of the 2019 regulations were repealed.[57]

More risky would be an aggressive approach towards climate change under the Act, should the agency decide to pursue it. Such an approach could provide an opportunity for a court to determine whether proximate cause requirements apply to Section 7 and also to determine more generally how strict the proximate cause standard is under the Act for Sections 7 and/or 9. A ruling setting strict proximate cause standards would potentially limit application of the Act more broadly than just for climate change, and also would require a legislative fix, which would be unlikely.

Finally, as noted above, the new administration can expect that environmental groups will continue to press the agencies through citizen suit litigation. Litigation to force the listing of additional species seems likely, as well as litigation to seek to apply the Act to address climate change.

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[56] If the two-step approach is taken, one question to address is whether the first step – revocation – should be a simple revocation of all of the provisions of the 2019 regulations, or should maintain some of the provisions that provide administration efficiencies, such as some of the changes to Section 7. Complete revocation would be easier to justify on procedural grounds; partial revocation would likely require justification on substantive grounds, which would take more time and be more vulnerable to litigation.

[57] There are also constitutional challenges to the application of the ESA to species located only within one state, though that threat would exist irrespective of any of the proposals in this memo.