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“Whatever the Cost”: How the July 2018 Proposed Rules to the Endangered Species Act Fall Short of the Act’s Original Intent, 53 UIC J. Marshall L. Rev. 429 (2020)

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“WHATEVER THE COST”: HOW THE JULY 2018 PROPOSED RULES TO THE ENDANGERED SPECIES ACT FALL SHORT OF THE ACT’S ORIGINAL INTENT

SAM SPARKS*

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Abstract

The status of the Endangered Species Act (ESA) is in peril. Under the July 2018 proposed rules to the ESA, federal agencies will have the power to consider economic rather than biological factors and to put extractive industries before imperiled wildlife. In essence, the July 2018 proposed rules allow federal agencies to undermine the original intent of the ESA – to halt and reverse species extinction, whatever the cost may be. Under the proposed rules, the future of species that rely on the ESA as the last line of defense is unknown. To have an ESA that is both effective and true to Congress’s original intent in passing the ESA in 1973, industry interests such as oil, gas, and logging must remain separate from the ESA.

This paper will examine the ESA’s history and the July 2018 proposed rules in detail before comparing those rules to the ESA’s original intent. After concluding that the proposed rules allow federal agencies to act contrary to the original intent, this paper will discuss how citizen involvement and sufficient funding is critical to help species that depend on the ESA. The July 2018 proposed rules diminish the effectiveness of the ESA, contributing to the ESA’s own extinction.

I. INTRODUCTION

Endangered species have become the new “political animals.”¹ Perhaps not in Aristotle’s sense of the phrase, but the literal sense.² In today’s political sphere, endangered species are up against powerful political corporations and alliances of conservative legislators.³

The Endangered Species Act (ESA) was established to protect vulnerable animals and plant species alike.⁴ However, politicians with legislative agendas that weaken or undermine the ESA, have placed the interests of “extractive industries” like oil and gas drilling, logging, and trophy hunting before those of imperiled wildlife.⁵ On July 25, 2018, the federal agencies in charge of administering the ESA—the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (informally known as NOAA Fisheries)—proposed changes⁶ to vital sections of the ESA. The proposals upset the original intent and purpose of the ESA, which was designed to protect at-risk animals and plants, and instead favor politically powerful corporations and industrial

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1. U.S. Fish & Wildlife Serv., *Endangered Species Act: Overview*, U.S. FISH & WILDLIFE SERV. (Dec. 11, 2018), www.fws.gov/endangered/laws-policies. In regard to species, “endangered” refers to a species that is in danger of extinction throughout all or a significant portion of its occupied area. *Id.* Meanwhile, “threatened” refers to a species is likely to become endangered within the foreseeable future. *Id.*

2. See Aristotle *Insists that Man is Either a Political Animal (the Natural State) or an Outcast like a “Bird Which Flies Alone”* (4thC BC), PORTABLE LIBR. OF LIBERTY (Mar. 17, 2008), oll.libertyfund.org/quotes/164 (discussing the interpretation of Aristotle’s quote, “that man is by nature a political animal”).

3. Jimmy Tobias, *The Attacks on the Endangered Species Act are Part of a Much Deeper Plot*, NATION (Sept. 4, 2018), www.thenation.com/article/the-attacks-on-the-endangered-species-act-are-part-of-a-much-deeper-plot.

4. Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (2012).

5. Compare Randy Gibbs, *SCI Supports USFWS Proposed Improvements to ESA*, SAFARI CLUB INT’L (Jul. 19, 2018), www.safariclub.org/news/sci-supports-usfws-proposed-improvements-esa (stating how trophy hunters support the proposed changes), with Emily Atkin, *A New Golden Age for Trophy Hunters*, NEW REPUBLIC (Aug. 14, 2018), newrepublic.com/article/150637/new-golden-age-trophy-hunters (explaining the overall effect of the proposed changes will result in less protections for species, especially species threatened with trophy hunting, like giraffes).

6. Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (proposed July 25, 2018) (to be codified at 50 C.F.R. pt. 424); Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Interagency Cooperation, 83 Fed. Reg. 35193 (proposed July 25, 2018) (to be codified at 50 C.F.R. pt. 402). The final versions of these rules were announced on August 27, 2019, effective on September 26, 2019 and October 28, 2019, respectively. 84 Fed. Reg. 44976 (2019).

interests.⁷ The proposed rules are poised to “slam a wrecking ball” into the most vital statutory protections for endangered wildlife.⁸ This begs the question at the center of this comment: How does the July 2018 proposed rules effectively undermine the original purpose of the ESA?

Part II.A. of this comment details the relevant ESA history and the intent of Congress in passing the ESA. This overview is necessary to understand why Congress passed the ESA and what protections Congress intended to include within the ESA. Part II.B. discusses the congressional purpose and policy of the ESA as expressed within the text of the legislation. Part II.C. discusses Congress’s specific intent in passing the ESA. Part II.D. briefly explains the pertinent proposed rules from the July 25, 2018 proposal.

Part III discusses how the proposed rules effectively change the purpose and intent of the ESA. This is important in understanding the effect that the proposed rules would hypothetically have on endangered species. Specifically, Part III.A. will detail the comparison of section 4 to the proposed rules. Part III.B. will detail section 7’s comparison. Part III.C. will then look at the overall effect of the proposed rules on the ESA.

Part IV proposes two alternative solutions to amending the ESA along with a broad proposal for society as a whole. First, Part IV.A. proposes that industry interests must be kept out of ESA reform efforts. Second, Part IV.B. notes that if industry interests are not kept out, then the ESA should be scrapped and a “new,” more balanced ESA should be passed.

II. BACKGROUND

A. *A Brief History of the Endangered Species Act*

Before the ESA was created, the Endangered Species Preservation Act of 1966⁹ was passed to provide a means for listing native animal species as endangered and giving them limited protection, including protection for “species in danger of ‘worldwide extinction.’”¹⁰ The Amendment of 1969 provided additional

7. Rebecca Bowe, *What’s Behind Attacks on the Endangered Species Act? Lots of Industry Money*, EARTHJUSTICE (Jul. 18, 2017), earthjustice.org/blog/2017-july/what-s-behind-attacks-on-the-endangered-species-act-lots-of-industry-money-1.

8. Darryl Fears, *Endangered Species Act Stripped of Key Provisions in Trump Administration Proposal*, WASH. POST (Jul. 19, 2018), www.washingtonpost.com/news/animalia/wp/2018/07/19/endangered-species-act-stripped-of-key-provisions-in-trump-administration-proposal.

9. Endangered Species Preservation Act of 1966, Pub .L. No. 89-669, 80 Stat. 926 (Oct. 15, 1966), <https://uscode.house.gov/statutes/pl/89/669.pdf>.

10. U.S. Fish & Wildlife Serv., *History of the Endangered Species Act of 1973*, U.S. FISH & WILDLIFE SERV. (Aug. 2011), www.fws.gov/endangered/esa-

protection to several species in danger of worldwide extinction by “prohibiting their importation and subsequent sale” in the United States.¹¹ Moreover, in 1973, 80 nations signed the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which “monitors, and in some cases, restricts international commerce in plant and animal species believed to be harmed by trade.”¹² After the implementation of CITES, President Richard Nixon declared that the current species conservation efforts were inadequate and called on the 93rd Congress to pass a new, comprehensive, endangered species legislation.¹³ Congress passed the ESA later that year.¹⁴

The ESA of 1973¹⁵ is broad in scope and provides a wide range of protection for listed animals. Specifically, the ESA consists of 18 sections that strengthen elements of prior legislation, regulate commerce of listed and economically valuable species, and provide a formal process to list species as either endangered or threatened.¹⁶ These provisions made the ESA the ideal legal tool to combat the loss of biodiversity caused by extinction.¹⁷

Soon after the ESA was passed, “development-minded individuals”¹⁸ began to realize that the ESA was particularly strong in implementing restrictions if endangered species were found in a critical habitat.¹⁹ Opponents of the ESA began to lobby Congress to amend the Act.²⁰ However, the case *Tennessee Valley Authority v. Hill* (otherwise known as *TVA v. Hill*) soon became the focus of the

library/pdf/history_ESA.pdf [*hereinafter* FWS ESA History].

11. *Id.*; DOUGLAS CHADWICK & JOEL SARTORE, THE COMPANY WE KEEP: AMERICA’S ENDANGERED SPECIES 19-21 (Nat’l Geographic Soc’y ed., 1996).

12. Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087 (Mar. 3, 1973).

13. Richard Nixon, *Special Message to the Congress Outlining the 1972 Environmental Program*, AM. PRESIDENCY PROJECT (Feb. 8, 1972), www.presidency.ucsb.edu/ws/index.php?pid=3731.

14. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973).

15. *Id.*

16. JAN A. RANDALL, ENDANGERED SPECIES: A REFERENCE HANDBOOK 27 (2018); FWS ESA History, *supra* note 10. The important provisions define “endangered” and “threatened” and: make plants and all invertebrates eligible for protection (section 3); make five criteria for listing species (section 4); require federal agencies to use their authorities to conserve listed species and to consult on “may affect” actions (section 7); prohibit federal agencies from authorizing, funding, or carrying out any action that would jeopardize a listed species or destroy or modify its “critical habitat” (section 7); and, apply broad “take” prohibitions to all endangered animal species (section 9). FWS ESA History, *supra* note 10.

17. RANDALL, *supra* note 16 at 27. The ESA was signed by President Richard Nixon and was a product of a bipartisan Congress. *Id.* The law received a unanimous vote in the Senate and a vote of 390-12 in the House of Representatives. *Id.*

18. *Id.* at 30.

19. *Id.*

20. *Id.* Opponents included industries concerned with natural resources. *Id.*

lobbying.²¹ In *TVA v. Hill*, the construction of the Tellico dam would have taken away a portion of the endangered snail darter’s critical habitat.²² The Supreme Court ruled to uphold the ESA and stop the construction of the Tellico dam based on the “no exceptions” provision in the ESA.²³ In response to this ruling, Congress amended the ESA to establish a mechanism to circumvent the decision.²⁴ Congress established the Endangered Species Committee, which became known as the “God Squad” because it has the power to exempt federal agencies from provisions of the ESA.²⁵ The God Squad has the power to determine what species could go extinct based on unscientific considerations.²⁶ After the amendment, the Tellico dam was finished, and the snail darter was left to the mercy of “pork barrel politics and the media,” furthering the idea that the protection of endangered species is political.²⁷ On a positive note, a recovery plan for the snail darter was approved in 1983 and, through protection and conservation efforts, the snail darter’s federal listing was eventually degraded from endangered to a threatened species.²⁸

In 1982, important amendments were passed that changed section 4 of the act, which focuses on the listing of species eligible for protection under the ESA.²⁹ Private landowners and developers

21. *Id.*; *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

22. See RANDALL, *supra* note 16 at 30. The three-inch snail darter fish was listed as endangered in 1975 and thus 17 miles of the Little Tennessee River was designated as a critical habitat to aid in protection. *Id.* The Tellico Dam was planned to be the last of 69 dams to be built on the river. Many opposed the construction because it would displace families and destroy the last free-flowing river in the area. *Id.* Construction of the dam was delayed for two years because of the opposition. *Id.* During the delay, a biologist from the University of Tennessee discovered the endangered snail darter. *Id.* From then on, the ESA became the basis for the *Tenn. Valley Auth. v. Hill* case because the snail darter presented a strong legal basis for an injunction to stop the dam’s construction. *Id.*

23. *Id.* at 31; *Tenn. Valley Auth.*, 437 U.S. at 153.

24. RANDALL, *supra* note 16 at 31.

25. *Id.*; accord FWS ESA History, *supra* note 10 (listing other 1978 ESA amendments such as: Section four which provided that a “Critical Habitat was required to be designated concurrently with listing a species,” when practicable, and “economic and other impacts of designation were also required to be considered in deciding on boundaries on endangered species”).

26. RANDALL, *supra* note 16 at 31 (discussing the God Squad).

27. *Id.* at 32-33.

28. Species Profile for Snail darter (*Percina tanasi*), ECOS ENV’T CONSERVATION ONLINE SYS., ecos.fws.gov/ecp0/profile/speciesProfile?spcode=E010 (last visited Mar. 17, 2020).

29. FWS ESA History, *supra* note 10. The amendments required that determinations of the status of species were required “to be made solely on the basis of biological and trade information.” *Id.* This was to be done “without consideration of possible economic or other effects.” *Id.* Additionally, the amendments added that the “final rule to determine the status of a species was required to follow within one year of its proposal unless it was withdrawn for cause.” *Id.* That “requirement replaced a two-year limit that had been enacted

believed the definition of “take” in the 1973 ESA was far too restrictive.³⁰ They feared that investments in projects could be thwarted by the discovery of an endangered species at any time.³¹ In fact, the discovery of the mission blue butterfly did just that; the discovery halted a housing development project on San Bruno Mountain in California.³² As a result, Congress amended the narrow restrictions on the “take” provision in the original ESA to allow landowners and developers more flexibility to continue projects.³³ Specifically, projects could proceed if the parties developed a Habitat Conservation Plan (HCP).³⁴ HCP’s are “planning documents required as part of an incidental take permit.”³⁵ HCP’s must describe the anticipated effects of the proposed taking, how those effects will be mitigated, and how the HCP is to be funded.³⁶ Moreover, “anyone whose otherwise-lawful activities will result in the ‘incidental take’ of a wildlife species needs a permit.”³⁷

In 1988, Congress again amended the HCP provisions.³⁸ The

in 1978 on [the adoption] of a final rule.” *Id.* The reason for this change was that a “failure to meet the two-year deadline had been grounds for mandatory withdrawals of more than 1,500 proposed species listings in 1979.” *Id.*

30. RANDALL, *supra* note 16 at 33.

31. *Id.*

32. *Id.*

33. *Id.* at 33-34; U.S. Fish & Wildlife Serv., *Habitat Conservation Under the Endangered Species Act*, U.S. FISH & WILDLIFE SERV. (Apr. 2011), www.fws.gov/endangered/esa-library/pdf/hcp.pdf. The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* Additionally, “harm” includes any significant habitat modification that actually kills or injures a listed species through impairing essential behavior such as breeding, feeding, or sheltering. *Id.*

34. RANDALL, *supra* note 16 at 33-34. The mission blue butterfly, *Icaricia icarioides missionensis*, is a listed endangered insect species. *Id.* Citizen groups, developers, and government officials worked together to formulate an HCP for San Bruno Mountain that protected the mission blue butterfly but still allowed for a lawful development of houses. *Id.* San Bruno Mountain was awarded the FWS’s first HCP in 1983 and became a model for future HCP’s. *Id.* The San Bruno Mountain HCP protected 3,000 acres and 87% of the habitat for three endangered species: the mission blue butterfly, the callippe silverspot butterfly, and the multicolored San Francisco garter snake. *Id.* Developers supported the HCP because the space between units made them more expensive. *Id.* However, opponents of the HCP were concerned about invasive species and the difficulty in replacing the degraded habitat. *Id.*

35. *Habitat Conservation Under the Endangered Species Act*, *supra* note 33.

36. *Id.*

37. *Id.* HCPs can apply to non-listed and listed species, including candidate species or species that have been proposed for listing. *Id.* The FWS can “help determine whether a proposed project or action is likely to result in a ‘take’ and whether an HCP is needed.” *Id.*

38. H.R. REP. NO. 97-835 at 31-32 (1982) (discussing that the San Bruno Mountain HCP was planned to be the model for future HCPs); *Endangered Species Act Amendments of 1988*, Pub. L. No. 100-478, 102 Stat. 2306, 2306-07

1988 amendments required the HCP to undergo public notice and comments, five years of monitoring recovered species, and biennial reports on the recovery status of all species.³⁹ As mandated by the 1988 amendments, the FWS is required to monitor recovery reports of listed species.⁴⁰ Additionally, the FWS is required to adopt an emergency listing of a species when there is evidence of a significant risk to the species.⁴¹

Even with the option of HCPs, landowners were still wary of participating in the conservation of endangered species.⁴² Landowners were fearful of future unforeseen limitations on what they could or could not do with their land.⁴³ In response, the “No Surprise” policy and the Safe Harbor Agreement (SHA) were implemented.⁴⁴ The “No Surprise” policy assured landowners that they would not be held liable for endangered species if any unforeseen circumstances arise with regard to the HCP.⁴⁵ Additionally, any additional expenses because of unforeseen circumstances would be borne by the federal government or other entity, not the landowner.⁴⁶ The SHA is a voluntary program for private landowners to conserve endangered species on their land in exchange for assurance that the FWS will not require any different management of the species without the landowner’s consent.⁴⁷

Today, the ESA is administered by the U.S. FWS and the Commerce Department’s National Marine Fisheries Service (NMFS).⁴⁸ FWS’s primary responsibility is for terrestrial and freshwater organisms.⁴⁹ NMFS’s primary responsibility is mainly

(1988).

39. H.R. REP. NO. 97-835 at 34; FWS ESA History, *supra* note 10.

40. RANDALL, *supra* note 16 at 34.

41. FWS ESA History, *supra* note 10. The section providing for the protection of endangered plants “also includes a prohibition on malicious destruction on federal land” and any other ‘taking’ that violates State law. *Id.*

42. RANDALL, *supra* note 16 at 34.

43. *Id.* (stating that about 80% of endangered species occur on private property).

44. *Id.*

45. *Id.*

46. *Id.* at 35.

47. *Id.*; *Habitat Conservation Under the Endangered Species Act*, *supra* note 33. (discussing the “No Surprise” policy, SHA, and “unforeseen circumstances”). In addition to the 1988 ESA amendments, the National Defense Authorization Act for Fiscal Year 2004 “exempted the Dep’t of Defense from critical habitat designations so long as an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a)” was acceptable to the Secretary of the Interior and in place. FWS ESA History, *supra* note 10. Additionally, the National Defense Authorization Act for Fiscal Year 2009 established the authority of Defense facilities to participate in offsite mitigation banking for protected species. *Id.*

48. *Endangered Species Act Overview*, U.S. FISH & WILDLIFE SERV. (last updated Jan. 30, 2020), www.fws.gov/endangered/laws-policies.

49. *Id.*

marine wildlife.⁵⁰ Additionally, there is a commitment for “engagement and collaboration” between the FWS, NMFS, and state fish and wildlife agencies on a wide range of ESA implementation.⁵¹

Many states today have developed their own endangered species programs. While these programs vary, states do not have exclusive control over endangered or threatened species residing in their borders, even if that species is solely indigenous to one particular state.⁵² The ESA largely favors uniform federal legislation for the protection of endangered species rather than a patchwork of state-based ESA implementation.⁵³

Additional species listings under the ESA still continues yearly, but sometimes slowly.⁵⁴ The FWS has a policy specifying completion within three years;⁵⁵ however, the ESA does not specify when a recovery plan must be completed.⁵⁶ Because the ESA details no time specification, the average time for completion is approximately six years.⁵⁷ In the past, the number of recovery plans that were completed increased steadily from the Ford administration up through the Clinton administration, but decreased during George W. Bush’s administration, as that particular administration favored industry interests over species conservation.⁵⁸

Today, the ESA has again become intensely political with industry interests lurking behind the July 2018 proposed rules to the ESA, but many still believe that the extinction of species is of concern.⁵⁹

50. *Id.*

51. RANDALL, *supra* note 16 at 36.

52. *See* *Palila v. Haw. Dep't of Land & Nat. Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988) (holding that a “taking” can include “habitat modifications” that harm the wildlife but do not cause either actual or proximate injury or death to a species).

53. Jack R. Nelson, *Palila v. Hawaii Department of Land and Natural Resources: State Governments Fall Prey to the Endangered Species Act of 1973*, 10 *ECOLOGY L.Q.* 281, 310 (1982).

54. *See, e.g.*, James William Gibson, *Cleaning Up Bush's Mess on Public Land*, *L.A. TIMES* (Apr. 2, 2009), www.latimes.com/opinion/la-oe-gibson2-2009apr02-story.html (acknowledging that George W. Bush favored industries and leased public land for private oil and gas extraction before conserving species); RANDALL, *supra* note 16 at 36 (comparing the George W. Bush administration’s listing (8 per year, 60 total) to Barack Obama’s administration’s listing (390 total)).

55. RANDALL, *supra* note 16 at 36.

56. Noah Greenwald, et al., *Factors Affecting the Rate and Taxonomy of Species Listings Under the U.S. Endangered Species Act*, in, DALE D. GOBLE, ET AL., *THE ENDANGERED SPECIES ACT AT THIRTY: VOL.1: RENEWING THE CONSERVATION PROMISE*, 50-67 (2005).

57. *Id.*

58. *Id.*

59. RANDALL, *supra* note 16 at 40.

B. Stated “Purpose” and “Policy” of the ESA

Section (a) of the ESA provides congressional findings from 1973, in which Congress finds and declares that various species of fish, wildlife and plants in the United States are extinct.⁶⁰ Further, their extinction was a result of economic growth and development that has not been halted by adequate concern and conservation.⁶¹ Congress goes on to say that there are other species of fish, wildlife, and plants that have been depleted in numbers and are in danger of becoming extinct.⁶² Additionally, Congress finds that these species of fish, wildlife, and plants are valuable to the “Nation and its people.”⁶³

Section (b) provides the purposes of the ESA.⁶⁴ One primary purpose is to provide a means by which threatened and endangered species may be conserved.⁶⁵ This includes both in the United States and internationally.⁶⁶ 2(b) provides that any steps must be taken to achieve the purposes of the treaties and conventions set forth in 2(a), including migratory bird treaties with Canada and Mexico, the International Convention for the Northwest Atlantic Fisheries, and CITES.⁶⁷

60. 16 U.S.C.S § 1531 (a)(1) (2020) states the following:

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation

61. *Id.* at § 1531 (a)(2) (2020) states:

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction

62. *Id.*

63. *Id.* at § 1531 (a)(3) (2020) states:

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people. . .

64. *Id.* at § 1531(b) (2020).

65. *Id.* at § 1531(b) (2020). This section of the ESA provides the specific purposes. Those are to:

[P]rovide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in Section 2(a). *Id.*

66. *Id.*

67. *Id.* at § 1531 (a)(4)-(5) (2020) states:

(4) [T]he United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant

Moreover, the stated policy of the ESA in section 2(c) provides that all federal departments and agencies “shall seek to conserve endangered species and threatened species.”⁶⁸ All federal departments and agencies shall seek and utilize their authorities in accordance with the stated purposes of the ESA.⁶⁹ All federal departments and agencies shall utilize their authorities in accordance with the furtherance of the ESA and shall cooperate with State and local agencies to resolve any issues involving the conservation of endangered species.⁷⁰

C. Intent of Congress in Passing the ESA

The “plain intent” of Congress in enacting the ESA was to “halt and reverse the trend toward species extinction, whatever the cost.”⁷¹ This plain intent reflects the stated purpose and policy of

to —

- (A) migratory bird treaties with Canada and Mexico;
 - (B) the Migratory and Endangered Bird Treaty with Japan;
 - (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;
 - (D) the International Convention for the Northwest Atlantic Fisheries;
 - (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;
 - (F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and
 - (G) other international agreements; and
- (5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation’s international commitments and to better safeguarding, for the benefit of all citizens, the Nation’s heritage in fish, wildlife, and plants.

68. *Id.* at § 1531(c) (2020). This section provides the policy in passing the ESA:

- (1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act. (2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species. *Id.*

69. *Id.*

70. *Id.*

71. *Tenn. Valley Auth.*, 437 U.S. at 184. The intent of Congress in passing the ESA can be seen largely through the *Tenn. Valley Auth. v. Hill* case, where

the ESA.⁷² Since the initial debates about the ESA, Congress has made it abundantly clear that the balance of priorities is struck in favor of “affording endangered species the highest of priorities.”⁷³

When Congress held hearings on what would later become the ESA of 1973, wildlife activists and scientists informed Congress that species, in general, were being lost at the rate of one species per year.⁷⁴ The “pace of disappearance of species” appeared to be “accelerating.”⁷⁵ It was clear to Congress that “[Man] and his technology” has continued at “an ever-increasing rate to disrupt the natural ecosystem.”⁷⁶ As a result, Congress recognized that the world’s wildlife faced severe threats in the face of the rise of technology.⁷⁷ Thus, “the dominant theme pervading all of the Congressional discussion of the proposed [ESA] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources.”⁷⁸

Specifically, Congress was concerned about “the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet.”⁷⁹ Congress concluded that the evolution of technology threatens species’ genetic heritage—including our own.⁸⁰ From the most narrow point of view, Congress found that it is in the best interests of mankind to minimize the losses of genetic variations; species are “keys to puzzles which we cannot solve, and may provide answers

the Supreme Court detailed why Congress originally passed the ESA. *Id.* The Supreme Court then goes on to look at the plain meaning of the ESA and offer a strict construction of the ESA and plain meaning. *Id.*

72. See discussion *infra* Part II.B.

73. *Tenn. Valley Auth.*, 437 U.S. at 194 (asserting that while it is Congress’s duty to “formulate legislative policies and to mandate programs and projects,” it must also “establish what their relative priority for the Nation,” as well).

74. *Endangered Species Conservation Act, Hearing on H.R. 37 Before the House of Representatives*, 93rd Cong. 306 (1973) (statement of Stephen R. Seater, for Defenders of Wildlife); See *Biodiversity Loss & the Extinction Crisis*, TROPICAL CONSERVATION FUND, [/www.tropicalconservationfund.com/biodiversity.html](http://www.tropicalconservationfund.com/biodiversity.html) (last visited April 27, 2020) (discussing extinction as a natural phenomenon, occurring at a natural “background” rate of 1-5 species per year. Scientists estimate that we are losing species at 1,000 to 10,000 times the background rate, with many going extinct every day).

75. H.R. REP. NO. 93-412, 93d Cong., 1st Sess. 4 (1973).

76. *Endangered Species Conservation Act, Hearing on H.R. 37 Before the House of Representatives*, 93rd Cong. 202 (statement of Assistant Secretary of the Interior).

77. *Id.* The Assistant Secretary of the Interior went on to say that “half of the recorded extinctions of mammals over the past 2,000 years have occurred in the most recent 50-year period.” *Id.*

78. George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N. D. L. REV. 315, 321 (1975).

79. *Tenn. Valley Auth.*, 437 U.S. at 178-79 (Emphasis in original).

80. H.R. REP. NO. 93-412, at 4-5.

to questions which we have not yet learned to ask.”⁸¹ Moreover, “sheer self-interest” compels us as a country to be cautious about what species hold for the future and the institutionalization of that caution lies at the heart of the ESA of 1973.⁸²

Therefore, in shaping legislation to deal with the concern about the unknown future impacts of extinction, Congress began with the finding that the two major causes of extinction are hunting and destruction of natural habitats.⁸³ The greatest threat is the latter.⁸⁴ Thus, the plain intent of Congress was to counteract the harmful effects of habitat destruction and hunting.⁸⁵

Additionally, the broad reach of the original ESA is no mistake. The comprehensive scope of the ESA can be seen by Congress’s inclusion of both endangered species and threatened species as different categories.⁸⁶ This shows that Congress intended for the ESA to protect both endangered and threatened species alike, for it recognized that threatened species may become an endangered species without any sort of protection.⁸⁷

Moreover, the omission of any pointed “qualifying language that was included in previous endangered species legislation” shows a “conscious decision by Congress to give endangered species priority over the ‘primary missions’ of agencies.”⁸⁸ Thus, Congress intended for federal agencies to “afford first priority” to saving endangered species, and not to any ulterior industry priorities.⁸⁹ The first priority to saving endangered and threatened species, made abundantly clear by Congress, must be to conserve the species, “whatever the cost” may be and whatever the conservation may entail.⁹⁰

81. *Id.*

82. *Id.* at 5.

83. S. REP. NO. 93-307, at 2 (1973).

84. Rudy R. Lachenmeier, *The Endangered Species Act of 1973: Preservation or Pandemonium?*, 5 ENVTL. L. 29, 31 (1974).

85. *Id.*

86. 16 U.S.C. § 1532 (15) (1976 ed.).

87. *Id.*

88. *Tenn. Valley Auth.*, 437 U.S. at 185. “Congress, moreover, foresaw that § 7 would on occasion require agencies to alter ongoing projects in order to fulfill the [ESA]’s goals.” *Id.*

89. *Id.* at 184-85. The legislative history of ESA section 7 “reveals an explicit congressional decision to require agencies to afford first priority to the declared policy of saving endangered species.” *Id.* Section 7 provisions allow for the God Squad to determine what species get protection. *Id.* Federal agencies are allowed to undertake an action that would jeopardize listed species if a Cabinet-level committee exempts the action. *Id.*

90. *Contra* Robert Gordon, “*Whatever the Cost*” of the *Endangered Species Act*, *It’s Huge*, COMPETITIVE ENTER. INST. (Aug. 21, 2018), cei.org/content/whatever-cost-endangered-species-act-its-huge (discussing the term “whatever” as “hardly a standard that encourages fiscal responsibility” and that “unquantified costs cannot be used as a yardstick to judge the effectiveness of a program”).

D. July 25, 2018 Proposed Rules Overview

On July 25, 2018, FWS and NMFS proposed changes to vital sections of the ESA.⁹¹ The two vital sections affected by these proposed changes are 4 and 7.⁹²

Section 4 of the ESA provides the guidelines on the determination of endangered species and threatened species, including the factors and basis for listing and delisting species.⁹³

91. Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (proposed July 25, 2018) (to be codified at 50 C.F.R. pt. 424); Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Interagency Cooperation, 83 Fed. Reg. 35193 (proposed July 25, 2018) (to be codified at 50 C.F.R. pt. 402).

92. § 1533; § 1536.

93. § 1533(a)(1) (2020) provides:

- (1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
 - (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
 - (B) overutilization for commercial, recreational, scientific, or educational purposes;
 - (C) disease or predation;
 - (D) the inadequacy of existing regulatory mechanisms; or
 - (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(b)(1)-(2) (2020) provides the following basis for determinations:

- (A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.
- (B) In carrying out this section, the Secretary shall give consideration to species which have been—
 - (i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or
 - (ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign

The proposed rules change the criteria and procedures for establishing protections for “threatened species” by rescinding the ESA’s blanket rule under § 4(D), and change the procedures for the listing and delisting of species and the designation of “critical habitat.”⁹⁴ Additionally, FWS proposed to remove the phrase “without reference to possible economic or other impacts of such determination” from section 4(b)(1)(A), which required that listing and delisting determinations be based solely on scientific and biological criteria.⁹⁵ The removal of this phrase would allow “possible economic or other impacts of such determination” to be considered in the listing and delisting of species.⁹⁶

Section 7 of the ESA provides the guidelines for interagency cooperation between federal agencies.⁹⁷ Section 7 also provides how committees are established, including the God Squad.⁹⁸ The

nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

94. 83 Fed. Reg. at 35193-35201.

95. 83 Fed. Reg. at 35194-95.

96. *Id.*

97. § 1536 (2020).

98. § 1536(e)(1)-(3) (2020) provides:

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the “Committee”).

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric

proposed changes to the section 7 rules are more procedural than substantive. The proposal would change the criteria and procedures for the interagency consultation process, add new definition sections, and change certain standards for evaluating prohibited actions.⁹⁹ Specifically, FWS proposes to revise the definition of “destruction or adverse modification” by adding the phrase “as a whole” to the first sentence and by removing the second sentence of the pre-July 2018 proposed rules’ definition.¹⁰⁰

Under section 7(a)(2), federal agencies are required to consult with FWS to ensure that “actions they fund, authorize, permit, or otherwise carry out will not jeopardize the continued existence of any listed species or adversely modify designated critical habitats.”¹⁰¹ During the formal consultation process, FWS must prepare a biological opinion, in which it considers the effect that the given federal agency’s project will have on a listed species.¹⁰² FWS

Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

99. 83 Fed. Reg. at 35198. The proposals change the definitions of “destruction or adverse modification” of critical habitat, “effects of the action,” “environmental baseline,” and “programmatic consultation.” *Id.* The proposed changes also clarify what is necessary to initiate the formal consultation process, expedite the consultation process, establish that reasonable and prudent alternatives to not require specific demonstration of plans, and establishes that new circumstances or information will not always result in a re-initiation or consultation process. *Id.*

100. 83 Fed. Reg. at 35179. The relevant section of the ESA reads:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available. *Id.*

101. U.S. Fish & Wildlife Serv., *Consultations with Federal Agencies: Section 7 of the Endangered Species Act*, U.S. FISH & WILDLIFE SERV. (Apr. 2011), www.fws.gov/endangered/esa-library/pdf/consultations.pdf.

102. *Id.* The ESA directs all federal agencies to participate in conserving threatened and endangered species and to consult with FWS before initiating a project or action. *Id.* Before initiating an action, the federal agency must coordinate with FWS as to the species that may be within the action area and determine if the project may affect the species. *Id.* If so, informal consultation with FWS may be required. *Id.* Then, it the federal agency determines (and

proposes that it is not required to identify a “tipping point” beyond which a species cannot recover when making determinations about a species under 7(a)(2), but rather that 7(a)(2) grants it discretion to make its own determinations.¹⁰³

III. ANALYSIS

Section 4 and section 7 are the two main sections of the ESA that the proposed rules affect. Section 4’s proposed rules have to do with more substantive changes rather than procedural changes. Those changes will be discussed in III.A. After that, III.B. will include a discussion of section 7’s proposed rules, which are more procedural than substantive. Finally, III.C. will discuss the overall effect of the proposed rules to sections 4 and 7 and then compare the effect to the original intent of Congress in passing the ESA.

A. *ESA Section 4 Comparison*

Section 4 of the ESA provides the guidelines on the determination of endangered species and threatened species, including the factors and basis for listing and delisting species.¹⁰⁴ The ESA blanket rule under section 4(d) automatically establishes the same protections for threatened species as for endangered species.¹⁰⁵ Under the proposed rule, FWS would instead craft rules for each threatened species on a case-by-case basis.¹⁰⁶ The proposed change to the blanket rule would not affect protections already

FWS agrees) that the project is “not likely to adversely affect a listed species or designated critical habitat,” and FWS concurs in writing, then the informal consultation is concluded. *Id.* If FWS determines that the project is “likely to adversely affect a listed species or designated critical habitat,” the federal agency initiates formal consultation by providing information with regard to the nature of the anticipated effects. *Id.* The ESA allows 90 days for this consultation with 45 days for FWS to respond with a biological opinion. *Id.* The biological opinion must identify any reasonable and prudent alternatives that could allow the agency’s project to move forward. *Id.* FWS must also anticipate any incidental take that may result from the project and authorize that take in a separate statement. *Id.*; *See also* U.S. Fish & Wildlife Serv. & NMFS, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* at 1-1 (Mar. 1998), www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf (stating “in fulfilling these requirements, each agency is to use the best scientific and commercial data available”).

103. 83 Fed. Reg. at 35183.

104. *See* discussion *infra* Part II.D.

105. § 1533(d) (2020) (providing that “whenever any species is listed as a threatened species pursuant to subsection (c) of 1533, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species”).

106. 83 Fed. Reg. at 35200-01.

afforded to species that have been listed as threatened; this change only applies to future decisions to list a species as threatened or to reclassify a species from endangered to threatened.¹⁰⁷ The reasoning behind this proposed rule is to bring the FWS rule in line with the NMFS rule, which does not employ a blanket rule.¹⁰⁸ Moreover, FWS reasons that no two species are the same, and by crafting species-specific 4(d) rules for each threatened species, protections will be tailored to each species’ need.¹⁰⁹

Another proposed change to section 4 alters the criteria and procedures for the listing and delisting of species, along with the designation of “critical habitat.”¹¹⁰ Most importantly, the proposed rules define “foreseeable future” to make it clear that the meaning of the term “extends only so far into the future as the [FWS] can reasonably determine that both the future threats and the species’ responses to those threats are probable.”¹¹¹ Under the proposed definition, before a species is determined to be threatened, FWS will look at the species and its circumstances in order to determine if the species is likely to become an endangered species in the foreseeable future.¹¹²

Another important proposed rule is the removal of the phrase “without reference to possible economic or other impacts of such determination” from section 4(b)(1)(A) which requires that listing and delisting determinations be based solely on scientific and biological criteria.¹¹³ FWS provides that referencing economic and other impacts is allowed when making decisions if it “may be informative to the public.”¹¹⁴ Additionally, the proposed rules make

107. *Id.*

108. 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, U.S. FISH & WILDLIFE SERV. (July 19, 2018), www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-and-noaa-fisheries-seek-public-input-on-&_ID=36286.

109. *Id.*

110. RANDALL, *supra* note 16 at 28. Critical habitat is one of the most essential aspect of a species’ recovery. *Id.* The features of the habitats include space for population growth and protection from disturbances. *Id.* The proposed rules provide that FWS will first evaluate areas currently occupied by the species before looking at areas unoccupied by the species. *Id.* FWS must first find that there is a “reasonable likelihood” that an unoccupied area will contribute to the conservation of the species before designating a species’ critical habitat. *Id.*

111. 83 Fed. Reg. at 35195.

112. *Id.*

113. 83 Fed. Reg. at 35194-95; H.R. Rep. No. 97-567 at 19-20. The word “solely” was added into this section in the 1982 amendments to the ESA to clarify that the determination of a threatened or endangered species was to be made only by considering the biological criteria. H.R. Rep. No. 97-567 at 19-20. This was to prevent economic criteria or other non-biological criteria to outweigh a species’ need for protection. *Id.*

114. 83 Fed. Reg. at 35194. FWS maintains that determinations will still be made based solely on biological considerations, but there may be circumstances

the standard for delisting a species the same standard for listing a species and changes the reasons why a species would no longer be listed.¹¹⁵ FWS reasons that the language and standards before the July 2018 proposed rules for delisting species are being misinterpreted by courts, so it is easier to align the listing and delisting standards with one another.¹¹⁶

The “plain intent” of Congress in enacting the ESA was to “halt and reverse the trend toward species extinction, whatever the cost.”¹¹⁷ Compared to the original intent, the proposed section 4 changes do the opposite of “halt and reverse” the trend towards species extinction for three reasons.

First, the reasoning behind the rescission of the blanket provision is sensible because not every species is the same in terms of needs or threats.¹¹⁸ However, it is time consuming to do it on a case-by-case basis,¹¹⁹ and it takes away immediate protections that threatened species would get with the blanket rule. Protecting threatened species in the same way as endangered ones is more beneficial than waiting for FWS to determine the exact protections for a particular species because it is unknown how long the determination of protections will take. For it is better to over-protect a species in the beginning rather than wait for exact protections and find that it is too late to save the species. While it is true that a case-by-case approach provides the individualized protections that a species may need, most species that are listed as threatened need immediate protection.¹²⁰ This means that threatened species need immediate protection, “whatever the cost may be,” so that the species extinction is halted and reversed.¹²¹

Second, altering the definition of the term ‘foreseeable future’ certainly avoids speculation; courts have even “expressly endorsed” the tailored case-by-case approach of analysis of the foreseeable future to each listing.¹²² However, the proposed definition of ‘foreseeable future’ is a strict and narrow standard. Under the new definition, FWS must determine that there are conditions

where referencing economic criteria or economic impacts may be beneficial to the public. *Id.*

115. *Friends of Blackwater v. Salazar*, 691 F.3d 428, 428 (D.C. Cir. 2012) (confirming that when reviewing whether a listed species should be delisted, the factors in 4(a) must be applied).

116. 83 Fed. Reg. at 35196.

117. *Tenn. Valley Auth.*, 437 U.S. at 184.

118. 83 Fed. Reg. at 35200-01.

119. *U.S. Fish and Wildlife Service and NOAA Fisheries Seek Public Input on Proposed Reforms to Improve & Modernize Implementation of the Endangered Species Act*, *supra* note 108.

120. *Id.*

121. *Id.* See 83 Fed. Reg. at 35200-01.

122. *In Re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 709 F.3d 1, 15-16 (D.C. Cir. 2013).

potentially posing a danger of extinction.¹²³ In addition, FWS must determine that the species’ responses to those threats are probable.¹²⁴ If either of those determinations are not present, then FWS would not have the power to list a species.¹²⁵ This proposed narrow definition grants a great amount of power to FWS to determine if a species will be given protection.¹²⁶ With this power and discretion, FWS has the opportunity and ability to deny listing a species, even if listing that species would halt or reverse its extinction.¹²⁷ Essentially, altering this definition gives FWS the power and discretion to act contrary to the original intent in enacting the ESA, which was to “halt and reverse the trend toward species extinction, whatever the cost.”¹²⁸

Third, the removal of the phrase “without reference to possible economic or other impacts of such determination” allows economic and industry interests to subvert the intent of the ESA.¹²⁹ Supporters of removing the phrase suggest that collecting data about the economic interests and impacts of a species listing and presenting it to the public increases transparency and that removing the phrase does not necessarily mean that only the economic impacts will be considered.¹³⁰ However, allowing economic impacts to govern species listing determinations certainly erodes the “solely upon biological criteria” principle that the FWS has used since the 1982 amendments.¹³¹

A comparison of the section 4 proposed rules to the original intent of Congress when it passed the ESA show that the proposed rules grant a great amount of power and deference to the FWS to list/delist a species, designate a critical habitat, and allow listing determinations to include economic impacts rather than only the biological criteria of the species.¹³² The proposed changes make it easier for landowners to destroy endangered species’ habitats if

123. 83 Fed. Reg. at 35195.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Tenn. Valley Auth.*, 437 U.S. at 184.

128. *Id.*

129. Tobias, *supra* note 3.

130. David Bernhardt, *ICYMI: At Interior, We’re Ready to Bring the Endangered Species Act Up to Date*, HOUSE COMM. ON NAT. RES. (Aug. 9, 2018), [republicans-naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=405496](https://www.house.gov/newsroom/documentsingle.aspx?DocumentID=405496)(explaining that increasing transparency is a “a hallmark of good government”).

131. 83 Fed. Reg. at 35194-95; H.R. Rep. No. 97-567 at 19-20.

132. 83 Fed. Reg. at 35197; *Nat. Res. Def. Council v. United States DOI*, 113 F.3d 1121 (9th Cir. 1997). The proposed changes give FWS the authority to not designate a critical habitat for a species if it is found to be “not prudent.” 83 Fed. Reg. at 35197. This is an extremely broad and subjective measure. *Id.* FWS relies on the *NRDC* case. *Id.* In *NRDC*, the court expressed concern that the regulatory phrase “not beneficial to the species” was being misinterpreted to mean “not beneficial to most of the species.” *NRDC*, 113 F.3d at 1125-26.

they can claim listing would have a significant economic impact.

B. ESA Section 7 Comparison

The proposed rules change the criteria and procedures for the interagency consultation process, add new definition sections, and change certain standards for evaluating prohibited actions.¹³³ The biggest change to section 7 is the alteration of the jeopardy standards.¹³⁴ The pre-July 2018 proposed rules section 7 rule emphasizes that a federal action prohibited by the ESA is only prohibited if the action causes “appreciable” harm to a listed species or the critical habitat of a listed species.¹³⁵ In other words, when a species is jeopardized by degraded baseline conditions, any additional adverse impact is prohibited.¹³⁶ The proposed rule rejects this notion and sees this approach as inconsistent with the ESA and FWS regulations.¹³⁷ Moreover, FWS takes the positions that there is no “baseline jeopardy” standard, even for the most imperiled or endangered species.¹³⁸

Along with rejecting the jeopardy standards, FWS proposes that it is not required to identify a “tipping point” beyond which a species cannot recover when making determinations about a species under 7(a)(2), even though case law suggests that FWS should.¹³⁹ Per the proposed rules, FWS states that section 7(a)(2) provides it with the discretion to determine whether the statutory prohibition is exceeded.¹⁴⁰ FWS has not interpreted the statutory language as requiring the identification of any tipping point when making a

133. 83 Fed. Reg. at 35198.

134. § 1536 (2020).

135. *Id.*

136. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (asserting that “where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm”); *Turtle Island Restoration Network v. United States DOC*, 878 F.3d 725, 735 (9th Cir. 2017) (stating “[w]here a species is already in peril, an agency may not take an action that will cause an ‘active change of status’ for the worse”).

137. 83 Fed. Reg. at 35181-83.

138. 83 Fed. Reg. at 35182-83.

139. *See Oceana, Inc. v. Nat'l Marine Fisheries Serv.*, 705 F. App'x 577, 580 (9th Cir. 2017) (stating that “when a proposed action will have significant negative effects on the species’ population or habitat, the duty to consider the recovery of the species necessarily includes the calculation of the species’ approximate tipping point.”); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010) (overturning jeopardy analysis based on purported NMFS failure to determine “when the tipping point precluding recovery . . . is likely to be reached”). FWS states that neither the ESA nor their regulations state any requirement for the FWS to identify a “tipping point” as a necessary prerequisite for making section 7(a)(2) determinations, even though there is precedent case law. *Id.*

140. 83 Fed. Reg. at 35183.

species determination.¹⁴¹ Moreover, FWS states that its interpretation of the statutory language is further supported by the fact that the “state of science” does not allow them to identify a tipping point for many species.¹⁴² Additionally, FWS reasons that it has had “success in the recovery of several listed species” which did not reach a tipping point, despite low populations of the species.¹⁴³

Consultation with federal agencies, through section 7, is at the heart of the ESA.¹⁴⁴ Consultation has also been instrumental to ESA’s success.¹⁴⁵ Moreover section 7 of ESA represents the “institutionalization of caution” and shows that Congress intended for the consultation process to give the benefit of the doubt to species based on the best available scientific data.¹⁴⁶

As far as the section 7 proposed rules go, many of the definitions serve to clarify the meanings of the ESA.¹⁴⁷ However, the change of the jeopardy standards takes away the benefit of the doubt from the species and puts the species and their natural habitat at risk.¹⁴⁸ In addition, by only restricting any federal agency actions that diminish the value of a “critical habitat” as a whole, wildlife agencies will be able to turn a blind eye towards the vast majority of actions that will harm a species’ critical habitat.¹⁴⁹

FWS’s refusal to acknowledge that there is a “tipping point” in determining the effects that a proposed federal agency project has on a species grants FWS a high level of discretion. For instance, FWS could allow a federal agency to continue with a project, even if the tipping point precluding a species’ recovery is likely to be reached when the agency undertakes the project.¹⁵⁰ Even if FWS has had success in the past conserving “several species” which did not reach a tipping point despite low populations, that success does not speak to every species.¹⁵¹ Without acknowledging a tipping

141. *Id.*

142. *Id.*

143. *Id.*

144. See Center for Biological Diversity, *Re: Proposed Changes to Endangered Species Act § 7 Regulations* (Sept. 20, 2018), www.biologicaldiversity.org/campaigns/esa/pdfs/Sign-on-Letter-Opposing-Changes-to%20ESA-Section-7-regulations.pdf (explaining that “[s]ection 7 consultation is the key check-and-balance on federal agency actions to ensure that those actions do not (1) jeopardize species’ survival and recovery and (2) destroy or degrade critical habitat”).

145. *Id.*

146. *Id.*; *Tenn. Valley Auth.*, 437 U.S. at 184; Oliver A. Houck, *The “Institutionalization of Caution” Under § 7 of the Endangered Species Act: What Do You Do When You Don’t Know?*, 12 ENVTL. L. REP. 15001 (1982) (providing that section 7 of the ESA restrains federal agencies from taking action and discussing how the only U.S. Supreme Court decision to interpret section 7 characterizes the section as “the institutionalization of caution”).

147. 83 Fed. Reg. at 35179-82.

148. Houck, *supra* note 146; *Tenn. Valley Auth.*, 437 U.S. at 184.

149. 83 Fed. Reg. at 35179.

150. *Oceana*, 705 F. App’x at 580.

151. 83 Fed. Reg. at 35183.

point, FWS could approve federal projects that push listed species residing within the bounds of that project to the brink of extinction, by which point the species cannot fully recover.¹⁵² This certainly does not fit within Congress' intent to halt and reverse the trend towards extinction.¹⁵³

The proposed section 7 changes to the ESA certainly contradict the intent of Congress to halt and reverse the trend toward species extinction, whatever the cost may be, by rejecting the notion that even the most imperiled species are not entitled to baseline protections under the ESA.¹⁵⁴

C. Overall Effect of the Proposed Rules

Generally, the section 4 proposals will have a more long-term effect on the conservation of species, while the section 7 changes will have a short-term, immediate effect on the conservation of species.¹⁵⁵

The proposed section 4 rules will likely affect the number of species that are listed overall because factors other than biological factors may be considered.¹⁵⁶ In addition, these rules will also affect the extent to which the "threatened" species receives protection.¹⁵⁷ This could affect the population of any said "threatened" species. There will be relatively little immediate effect because the proposed rules rely and relate to future decisions to list, delist, or reclassify a species.¹⁵⁸ Moreover, the case-by-case analysis that is proposed will be time consuming and may be negatively impacted by economic or industrial influences.

On the other hand, the proposed section 7 rules will have an immediate effect on the conservation of threatened and endangered

152. Compare Ocean Tipping Points, *Understanding Ocean Tipping Points*, OCEAN TIPPING POINTS, oceantippingpoints.org/portal/what-are-tipping-points, (explaining that "[t]ipping points occur when small shifts in human pressures or environmental conditions bring about large, sometimes abrupt changes in a system – whether in a human society, a physical system, an ecosystem, or our planet's climate"), with Biodiversity Information System for Europe, *Tipping Points*, BIODIVERSITY INFO. SYS. FOR EUR., biodiversity.europa.eu/topics/tipping-points, (explaining that "[a] tipping point is defined . . . as a situation in which an ecosystem experiences a shift to a new state, with significant changes to biodiversity and the services to people it underpins, at a regional or global scale").

153. *Tenn. Valley Auth.*, 437 U.S. at 184.

154. 83 Fed. Reg. at 35182; *Tenn. Valley Auth.*, 437 U.S. at 184.

155. Perkins Coie, *Major Changes Proposed to Endangered Species Act Regulations*, PERKINS COIE (Jul. 24, 2018), www.perkinscoie.com/en/news-insights/major-changes-proposed-to-endangered-species-act-regulations.html.

156. *Id.*

157. 83 Fed. Reg. at 35159.

158. Coie, *supra* note 155.

species.¹⁵⁹ While there is a lot of technical language that FWS seeks to clarify and simplify, FWS also includes major changes.¹⁶⁰ Rejecting the notion of a pre-existing baseline jeopardy, while also specifying that any mitigating action need not be binding, will have more of an impact on conservation.¹⁶¹ In short, the implementation of the section 7 changes would effectively thwart the plain meaning of the ESA and would ignore the clear intent of Congress to “halt and reverse the trend toward species extinction.”¹⁶² Moreover, these regulations would give industry interests the benefit of the doubt in the consultation process rather than the endangered species, which is contrary to Congress’ initial intent.¹⁶³ In effect, the proposed changes would place endangered species at a substantially greater risk of extinction.¹⁶⁴

As far as industries and economic factors are involved with the proposed changes, industries say that “loosening” the ESA’s requirements will allow for economic development alongside species protection.¹⁶⁵ Moreover, one big stake group, trophy hunters, are applauding the proposed rules because they loosen the ESA.¹⁶⁶ The looser rules may make it easier for trophy hunters to import dead exotic species with dwindling populations to the United States.¹⁶⁷ The idea behind this notion is that species that are listed as endangered or threatened are protected against hunters under the ESA.¹⁶⁸ With looser rules, the ESA will not afford the same level of protection for species, which may result in trophy hunters killing

159. *Id.*

160. 83 Fed. Reg. at 35178-93.

161. Center for Biological Diversity, *supra* note 144.

162. *Tenn. Valley Auth.*, 437 U.S. at 184.

163. Center for Biological Diversity, *supra* note 144.

164. *Id.*

165. Emily Atkin, *A New Golden Age for Trophy Hunters*, NEW REPUBLIC (Aug. 14, 2018), newrepublic.com/article/150637/new-golden-age-trophy-hunters.

166. Randy Gibbs, *SCI Supports USFWS Proposed Improvements to ESA*, SAFARI CLUB INT’L (Jul. 19, 2018), www.safariclub.org/detail/news/2018/07/19/sci-supportsusfws-proposed-improvements-to-esa.

167. *Id.* This is especially worrisome for the giraffe specifically. Atkin, *supra* note 165. Currently, there are petitions for protections for giraffes under the ESA. *Id.* However, with the looser rules, giraffes are likely to only get threatened status, meaning trophy hunters may kill them and import them to the United States. *Id.*

168. Nat’l Park Serv., *Grizzly Bears & the Endangered Species Act*, U.S. DEPT OF INTERIOR (Oct. 5, 2018), www.nps.gov/yell/learn/nature/bearesa.htm. In July 2017, FWS removed the Yellowstone population of grizzly bears from the threatened species list, as it deemed that the population had risen enough. *Id.* In response, the first grizzly bear (trophy) hunting season in more than 40 years was set to be started in Fall of 2018. *Id.* In September 2018, a federal judge restored those protections for the Yellowstone-area population of grizzly bears under the ESA. *Id.* While the grizzlies have made a remarkable recovery, their conservation still continues today under the ESA. *Id.*

(and importing) exotic species at their will.¹⁶⁹

Thus, the overall effect of the proposed changes may result in less protections for species that rely on the protections that the ESA affords them.¹⁷⁰ Rescinding the blanket protections in section 4 and the jeopardy standard in section 7 strips vital protections from threatened and endangered species. With extinction there is no turning back; there is no second chance or instant replay to see who or what caused the extinction.¹⁷¹ Extinction “is final in a way that few things are final” and the proposed changes effectively undermine the original intent of Congress to “halt and reverse” the trend towards species extinction, no matter the cost.¹⁷²

IV. PROPOSAL

To have an ESA that is both effective and true to Congress’ original intent, industry interests must remain separate from the ESA. This is easier said than done. In the face of diminishment, vital sections of the ESA must be protected and preserved. If the vital aspects of the ESA will be diminished, as proposed, then a

169. Jef Akst, *Congress Considers Endangered Species Act Amendments*, SCIENTIST (Sept. 27, 2018), www.the-scientist.com/news-opinion/congress-considers-endangered-species-act-amendments-64872. Congress is considering a series of bills that would “institute changes to the Endangered Species Act that could shift control of conservation measures to state and local governments, accelerate decisions about whether species need protecting, and limit courts’ power to overturn decisions to lift or loosen species protections.” *Id.* These bills come after a federal judge decided to reinstate protections for grizzly bears in and around Yellowstone National Park, prohibiting planned hunts that would have allowed the harvesting of up to 23 grizzlies in Idaho and Wyoming this fall. *Id.* This court decision would have been blocked if the new laws were in place. Species like the gray wolf and grizzly bear faced extinction in the early 1900s but have rebounded in large part by the passage of the ESA. *Id.* Now, both species are a point of contention between wildlife advocates and farmers, who say that the predators are attacking livestock. *Id.* These bills paired with the proposed ESA changes show a shift towards the easing of protections for species that have and are benefiting from the ESA in favor of economic reasons. *Id.*

170. Sarah Matsumoto, et al., *The Citizen’s Guide to the Endangered Species Act*, EARTHJUSTICE (2003), earthjustice.org/sites/default/files/library/reports/Citizens_Guide_ESA.pdf. This guide presents a case study about the American Bald Eagle. *Id.* The eagles suffered from aggressive hunting and habitat loss. *Id.* In the 1940s, eagles suffered from the use of pesticides, particularly DDT. *Id.* DDT caused eagles to lay deficient eggs, and the population plummeted. *Id.* Public outcry led to the ban of DDT in the U.S. in 1972. *Id.* The plight of the eagle also helped spur Congress to pass the ESA in 1973. *Id.* Thanks to the ESA, which curtailed the felling of nesting trees and protected foraging areas, the American Bald Eagle population was saved. *Id.* The protection of the eagle was done with the original intent and purpose of the ESA. *Id.*

171. *Id.* at 52.

172. *Tenn. Valley Auth.*, 437 U.S. at 184.

“new” ESA should be drafted and passed. This “new” and updated ESA should focus on more funding through an increased budget allotment and include a less industry-interest focused bias on what species warrant protection. Moreover, citizens must play their part in the democratic process and vote out the politicians that seek to undermine the ESA with an industry-based agenda. Each proposal is discussed in turn.

A. *Keeping Industry Interests Out of the ESA*

It is vital to the future of the ESA that industry interests be kept separate from the conservation of species. The fossil fuel industry is “pitted against conservationists” because habitats for the imperiled plants and species “overlaps with lands eyed by industry for mining or drilling.”¹⁷³

Any future amendments or reform efforts must not alter the phrase “without reference to possible economic or other impacts of such determination” from section 4(b)(1)(A) which requires that listing and delisting determinations be based solely on scientific and biological criteria.¹⁷⁴ In the proposed rule for section 4(b)(1)(A)—Factors for Listing, Delisting, or Reclassifying Species, the FWS states that “[w]e propose to remove the phrase ‘without reference to possible economic or other impacts of such determination’ . . . to more closely align with the statutory language. . . The act requires the secretary to make determinations based ‘solely on the basis of the best scientific and commercial data.’”¹⁷⁵ If this rule is passed and finalized, the economic impact of protecting a species will be considered.¹⁷⁶ Allowing economic considerations and determinations erodes the “solely upon biological criteria” principle that the FWS has used since the 1982 amendments.¹⁷⁷ On its face, this rule may seem to do more good than harm. However, this rule will allow federal agencies to make a claim that the existence of natural resources like oil, gas, and timber, qualify as a compelling interest to not hand over certain protections for species that occupy

173. Fears, *supra* note 8; Bowe, *supra* note 7.

174. § 1533(b)(1)(A) (2020) states:

The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.

175. 83 Fed. Reg. at 35194.

176. *Id.*

177. FWS ESA History, *supra* note 10.

the same area as the natural resources.¹⁷⁸ The deletion of the “solely upon biological criteria” phrase effectively brings in industry interests, even if only one small line is removed. Without this small line, economic considerations and industry interests have the potential to outweigh any sort of biological criteria in favor of a species listing or determination.¹⁷⁹ Small changes like this undermine the ESA’s original intent and must be kept out of the ESA.

Critics of the ESA often base their concern on the damage that the ESA does to specific industries and how the ESA harms industry and economic interests.¹⁸⁰ However, the economic benefits of the ESA and the benefits of protecting endangered species are vast.¹⁸¹ Most importantly, the ESA does not just protect individual species, it protects the ecosystems that support the species as well.¹⁸² The ESA protects natural lands, thereby improving property values.¹⁸³ While the economic costs of the ESA are real, they tend to hit specific industries like oil and gas rather than the country at-large, whereas the country at-large benefits from the ESA.¹⁸⁴ Simply put, the ESA has “complicated the efforts” by the oil and gas industry to develop millions of acres of land that is rich in fossil fuels.¹⁸⁵ The changes proposed would prioritize these industry concerns and cut back the complications that the oil and gas industry face.

Corporate profitability should not play a hand in what species gets protection.¹⁸⁶ The ESA was intended to protect plant and

178. Fears, *supra* note 8.

179. *Id.*

180. Justin Worland, *The Endangered Species Act is Criticized for its Costs. But it Generates More than \$1 Trillion a Year*, TIME (July 25, 2018), time.com/5347260/endangered-species-act-reform.

181. *Id.* (explaining that local tourism and sustaining and improving natural lands, known as “ecosystem services,” brings in monetary benefits).

182. *Id.*

183. *Id.* Preserving wildlife also offers a more direct benefit by supporting local tourism. *Id.* The National Fish and Wildlife Foundation study found that land under the purview of the Army Corps of Engineers generated \$34 billion in sales and supported hundreds of thousands of jobs. *Id.*

184. Southwick Associates, *The Economics Associated with Outdoor Recreation, Natural Resources Conservation and Historic Preservation in the United States*, SOUTHWICK ASSOCIATES (Oct. 10, 2011), [www.fws.gov/refuges/news/pdfs/TheEconomicValueofOutdoorRecreation\[1\].pdf](http://www.fws.gov/refuges/news/pdfs/TheEconomicValueofOutdoorRecreation[1].pdf). This study prepared for the National Fish and Wildlife Foundation, a government-affiliated conservation group, classified the total value of ecosystem services at about \$1.6 trillion annually in the U.S. *Id.* The value totaled at more than \$32 billion in National Wildlife Refuges protected under the ESA. *Id.*

185. Worland, *supra* note 180. The logging industry is frustrated with its lack of growth. *Id.* Farmers who own their land cannot develop in the way they want as they face tough market conditions. *Id.*

186. See generally Maggie Caldwell, *Seven Ways Congress is Trying to Destroy the Endangered Species Act*, EARTHJUSTICE (Jan. 21, 2016),

animal species that benefit society as a whole, whatever the cost may be; the ESA was not intended to prioritize specific industry interests over the conservation of species.¹⁸⁷

B. Sufficient Funding, a New ESA, and Votes that Matter

The FWS receives funding to implement the ESA through budget(s) passed by Congress.¹⁸⁸ Thus, the amount of funding that the FWS receives for its overall budget and smaller budgets for listing, or for protecting critical habitats, varies by administration.¹⁸⁹ There is no doubt that the FWS needs more funding to implement the ESA.¹⁹⁰ In fact, the FWS’s budget has historically been a fraction of what is actually needed to carry out the ESA fully and effectively.¹⁹¹ However, if certain aspects of the ESA are to be diminished, as proposed, then a “new” ESA should be considered to replace the old ESA. Specifically, a more balanced and

earthjustice.org/features/political-animals (discussing how industry-backed politicians have introduced bills to undermine the effectiveness of the ESA by excluding entire states or regions from following conservation requirements).

187. *Tenn. Valley Auth.*, 437 U.S. at 184.

188. Tierra Curry, *Trump Budget is Death Sentence for Endangered Species*, CTR. FOR BIOLOGICAL DIVERSITY (Feb. 13, 2018), www.biologicaldiversity.org/news/press_releases/2018/endangered-species-funding-02-13-2018.php.

189. *Id.* The Trump administration proposes to slash the annual amount spent on “protecting additional species as endangered, as well as protecting critical habitat for already protected species” from \$20.5 million to under \$11 million. *Id.* This budget slashes FWS’s overall budget by \$300 million, or by 19%. *Id.* One in four species receives less than \$10,000 a year in recovery dollars, which is less than the \$12,375 in taxpayer money that former Secretary of the Interior Ryan Zinke spent on one chartered airplane flight. *Id.*

190. *See* Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 79 Fed. Reg. 234 (Dec. 5, 2014) at 72456 (stating that in 2014, the “median cost for preparing and publishing a 90-day finding is \$39,276; for a 12-month finding, \$100,690; for a proposed rule with critical habitat, \$345,000; and for a final listing rule with critical habitat, \$305,000); *see also* Gordon *supra* note 90, (discussing the litigation costs of listing a species, FWS and NMFS’ \$1.5 billion annual expenditures, and the potential billion-dollar recovery plans for species).

191. Noah Greewald, *Funding Study: U.S. Providing Just 3.5 Percent of What’s Needed to Recover Endangered Species*, CTR. FOR BIOLOGICAL DIVERSITY (Dec. 13, 2016), www.biologicaldiversity.org/news/press_releases/2016/endangered-species-12-13-2016.html; Noah Greenwald, Brett Hartl, et al., *Shortchanged: Funding Needed to Save America’s Most Endangered Species*, CTR. FOR BIOLOGICAL DIVERSITY, www.biologicaldiversity.org/programs/biodiversity/pdfs/Shortchanged.pdf. In 2016, FWS received roughly \$82 million per year for endangered species recovery, which is barely enough to cover administrative costs. *Id.* Based on the Center for Biological Diversity’s study, \$2.3 billion per year is needed if species are going to be fully recovered. *Id.*

updated version of the ESA that: 1) receives more funding, 2) shuts the door on industry-based agendas, 3) includes less bias on what species should be protected, and 4) aligns with the views of citizens as a whole.¹⁹²

The world around us is changing; the lapse in environmental legislation is troubling. Many of the environmental regulatory measures of the 20th century are not well equipped to handle today's problems.¹⁹³ In addition, animals are also generally favored over plants and only certain types of popular animals are usually favored for protection.¹⁹⁴ The political reality of the implementation of the ESA is that the FWS and NMFS have limited resources but somehow must assign priorities to species. The priorities are usually driven by social and political factors, or what species is more charismatic and "politically expedient."¹⁹⁵ This must change. Decisions of whether to list/delist a species or protect a species should be based on the best science available and solely upon biological criteria rather than the popularity of the species.

Endangered species programs, including the ESA, have never received sufficient funding to meet program goals.¹⁹⁶ Without adequate funding and resources, FWS and NMFS cannot properly protect the species that are on the brink of extinction.¹⁹⁷ Historically, core endangered species programs that cover recovery planning, consultation, and candidate conservation have been under-funded and need more resources to adequately protect endangered and threatened species.¹⁹⁸

The ESA is one of the best tools that this country has to ensure that "future generations will be able to enjoy the rich wildlife and biological heritage that we now cherish and benefit from in countless ways."¹⁹⁹ When all of the elements of the ESA are actively enforced and fully funded, it works.²⁰⁰ One thing is certain for the future of the ESA – funding must be increased. If vital aspects of the ESA are diminished, as proposed, then a "new" ESA should be drafted and passed that focuses on equal funding to FWS and NMFS. More funding would enable the FWS and NMFS to

192. RANDALL, *supra* note 16 at 101.

193. *Id.* at 62, 299. The ESA was passed in 1973 with the support of 99% of Congress. *Id.* Very little has been accomplished in Congress because it has become so polarized and cooperation minimized. Bipartisan legislation of any environmental laws is a "distant memory *Id.*

194. RANDALL, *supra* note 16 at 101.

195. *Id.* at 101-02.

196. Matsumoto, *supra* note 170 at 50.

197. *Id.* at 50-51. In 2003, FWS stated that approximately \$153 million is necessary just to list all the plant and animal species that need protection. *Id.* The listing program in 2003 only received \$9 million and additional requests for funding listing and critical habitat programs were denied. *Id.*

198. *Id.* at 51.

199. *Id.* at 52.

200. *Id.*

effectively conserve and protect the species that need it the most while also protecting species that just plainly need it.

As previously mentioned, the “plain intent” of Congress in enacting the ESA was to “halt and reverse the trend toward species extinction, whatever the cost.”²⁰¹ Moreover, Congress has made it clear that the balance of priorities struck in favor of “affording endangered species the highest of priorities.”²⁰² Funding the FWS and NMFS to give them the ability to halt and reverse the trend toward species extinction is certainly a great cost. However, it is a cost that Congress intended to undertake in order to fulfill the original intent behind passing the ESA.²⁰³ If vital ESA aspects are to be diminished, then a more balanced version of the ESA that includes more funding and less bias on what species should be protected should be considered to take its place.

Above all, if citizens are dissatisfied with the way that their representatives (local and national) are handling species conservation, then citizens should vote them out. Specifically, citizens should vote out the industry backed politicians that seek to undermine the ESA. Citizen involvement in the political sphere is imperative when it comes to pressing social issues. Moreover, citizens have the duty of educating themselves on pressing issues and responding accordingly. Considering that many Americans broadly support the ESA and other environmental protections, the citizens are the ones that have to speak for the protection and conservation of species for our future generations to enjoy.²⁰⁴

Not only are there proposed amendments to the ESA, politicians with economic or industry-based interests are constantly proposing and drafting bills that undermine the ESA in various ways.²⁰⁵ In the recent years, a number of members of Congress have introduced legislation that is designed to chip away at the “bedrock

201. *Tenn. Valley Auth.*, 437 U.S. at 184.

202. *Id.* at 194.

203. *Id.* at 184.

204. Worland, *supra* note 180 (warning that “[t]inkering with the Endangered Species Act isn’t a political winner.”); Frank Newport, *Americans Want Government to do More on Environment*, GALLUP (Mar. 29, 2018), news.gallup.com/poll/232007/americans-want-government-more-environment.aspx (discussing environmental surveys). In 2018, 57% of Americans said they would prioritize the environment and just 35% would prioritize economic growth. *Id.* 59% of Republicans favor economic growth, even if it risks harming the environment, while 76% of Democrats favor prioritizing the environment. *Id.* 62% of Americans say that the government is not doing enough for the environment. *Id.* The general trend in U.S. public opinion supports more, rather than less, government action to protect the environment. *Id.* Moreover, public opinion favors efforts to develop wind, solar, and other alternative fuel sources. *Id.*

205. Carly Nairn, *Whittled Down, Endangered Species Act Continues to be Chipped Away*, SIERRA CLUB (May 30, 2018), www.sierraclub.org/sierra/whittled-down-endangered-species-act-continues-to-be-chipped-away.

of wildlife protections” that is the ESA.²⁰⁶ This will continue until these politicians get their way or until they are voted out.

Industry-backed politicians only see the environment and environmental protections as an obstacle to industry interests.²⁰⁷ Politicians with a legislative agenda to weaken or undermine the ESA remain in power until the people vote them out and hold them accountable for their actions – or inactions.

V. CONCLUSION

The original purpose of the ESA was to protect animal and plant species.²⁰⁸ While these protections are broad and come at a cost to certain industries, industry interests should not supersede the protections placed on certain species of animals after years of interference from humans. The proposed rules diminish the effectiveness of the ESA. The thinly veiled industry interests underlying the proposed ESA rules cannot be forgotten. Politicians with legislative agendas actively seek to weaken or undermine the ESA.²⁰⁹ They put the interests of “extractive industries” over the imperiled wildlife.²¹⁰ The ESA is a vital last line of defense for species such as the grizzly bear, manatee, gray wolf, and bald eagle.²¹¹ By proposing rules contrary to the original intent and

206. *Id.* Many different representatives have attempted to chip away at the ESA. *Id.* In 2017, Utah representative Bob Bishop, the Republican chair of the Natural Resources Committee, advanced a number of them through the committee in an attempt to “modernize” the ESA, that would allow consideration of industry interests. *Id.* Texas representative Pete Olson introduced H.R. 717 that amends the ESA so that federal wildlife managers will have to consider economic factors as one of the primary criteria when deciding whether to accept or deny listing a new species or designating critical habitat. *Id.* Minnesota representative Collin Peterson introduced H.R. 424 that would permanently remove ESA protections for gray wolves in Wyoming, Wisconsin, Michigan, and Minnesota, and portions of North Dakota, South Dakota, Iowa, Illinois, Indiana, and Ohio. *Id.* H.R. 424 would also prohibit the judicial review of the removal, which would essentially allow Congress to make the final decision on the gray wolf’s protections, as opposed to a scientific review. *Id.* These are only a few of the many bills that have been proposed to chip away the protections that the ESA provides. *Id.*

207. Worland, *supra* note 180. Arizona Rep. Raúl M. Grijalva, the ranking Democrat on the House Natural Resources Committee stated: “If a single company can make a single dollar from the destruction or displacement of an endangered species, it’s full speed ahead.” *Id.*

208. *Tenn. Valley Auth.*, 437 U.S. at 184.

209. Nairn, *supra* note 205.

210. *Id.*

211. *The Endangered Species Act: A Wild Success*, CTR. FOR BIOLOGICAL DIVERSITY, www.biologicaldiversity.org/campaigns/esa_wild_success; Darryl Fears, *These Creatures Faced Extinction. The Endangered Species Act Saved Them*, WASH. POST (Mar.11, 2017), www.washingtonpost.com/news/animalia/wp/2017/03/11/eight-animals-saved-from-extinction-by-the-endangered-species-act.

purpose of the ESA, the future of these species, and many other like them, is unknown. With proposed rules that effectively undermine Congress’s intent to “halt and reverse the trend toward species extinction, whatever the cost,” the ESA itself faces its own extinction.²¹²

212. *Tenn. Valley Auth.*, 437 U.S. at 184.

