



[HOME \(/\)](#)
[ABOUT \(/ABOUT\)](#)
[JOURNAL \(/ABOUT\)](#)
[SUBSCRIBE \(/SUBSCRIBE\)](#)
[MASTHEAD \(/NEW-PAGE\)](#)
[PROSPECTIVE MEMBERS \(/PROSPECTIVE MEMBERS\)](#)
[STAFF RESOURCES \(/STAFF-RESOURCES\)](#)
 PUBLICATIONS
[PUBLICATION ARCHIVE \(/PUBLICATION-ARCHIVE\)](#)
[VOLUME 1 \(2009\) \(/VOLUME-1-2009-2010\)](#)
[VOLUME 2 \(2010\) \(/VOLUME-2-2009-2010\)](#)
[VOLUME 3 \(2011\) \(/VOLUME-3-2010-2011\)](#)
[VOLUME 4 \(2012\) \(/VOLUME-4-2011-2012\)](#)
[VOLUME 5 \(2013\) \(/VOLUME-5-2012-2013\)](#)
[VOLUME 6 \(2014\) \(/VOLUME-6-2013-2014\)](#)
[VOLUME 7 \(2015\) \(/VOLUME-7-2014-2015\)](#)
[VOLUME 8 \(2016\) \(/VOLUME-8-2015-2016\)](#)
[VOLUME 9 \(2017\) \(/VOLUME-9-2016-2017\)](#)
[VOLUME 10 \(2018\) \(/VOLUME-10-2018\)](#)
 SYMPOSIUM
[INFORMATION \(/SYMPOSIUM-INFO\)](#)
[BLOG](#)
[FULL BLOG \(/FULL-BLOG\)](#)
[BLOG ARCHIVE \(/BLOG-ARCHIVE-1\)](#)
[PODCASTS](#)
[ABOUT THE SHOW \(/NEW-PAGE-65\)](#)
[EPISODES \(/EPISODES\)](#)

October 18, 2019

TRUMP ADMINISTRATION MAKES CHANGES TO THE ACT THAT IS CREDITED WITH SAVING THE BALD EAGLE

[SUBMISSIONS \(/SUBMISSIONS\)](#)

[Impact! \(/full-blog/category/Impact%21\)](#)

BY: BENJAMIN A. DENNISON

In 1973 President Nixon signed the Endangered Species Act (ESA) into law, which created a program for the protection of threatened and endangered plants, animals, and the habitats where they are found.[i] The United States Fish and Wildlife Service and the National Marine Fisheries Service administers the ESA.[ii] The Act does several things. It makes it illegal to import, export, possess, sell, or transport any listed species of animals.[iii] It also has measures that protect critical habitats that are or may be occupied by listed species and is vital to the species' continued existence. [iv]

According to the Act, a species is endangered if it is “in danger of extinction throughout all or a significant portion of its range.”[v] A threatened species is one that is likely to become endangered in the “foreseeable future.”[vi] The ESA is very popular has been successful in its mission to protect endangered animals.[vii] The Act is viewed as a bedrock of environmental law[viii] that is credited with saving the United States’ national animal, the Bald Eagle, as well as the Grizzly Bear, the Humpback Whale, and numerous other species.[ix]

In August 2019, the Trump administration announced major changes to the ESA that could have unfortunate effects on many species of animals and plants and their habitats.[x] In one change, the government will now consider economic factors when categorizing a species as endangered or threatened.[xi] Before these changes, economic factors were not to be considered when policymakers made listing decisions.[xii] The law required that decisions be made based only on the best available

science and “without reference to possible economic or other impacts of such determination.”[xiii] These types of decisions had previously been based solely on scientific analysis.[xiv] The Trump administration’s new rule encourages policymakers to calculate the economic costs of protection for the plants and animals being considered for listing.[xv] Prioritizing economic costs over scientific data and the protection of animal species is counter to the purpose of the ESA as enacted in 1973 as evidenced by lawmaker’s explicit rejection of economic factors in the decision-making-process of listing.[xvi] In fact, the Supreme Court of the United States stated that “the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”[xvii]



Credit (<https://www.mtpr.org/post/3-hunters-injured-2-montana-grizzly-attacks>)

The new rules also change the understanding of “foreseeable future” under the Act.[xviii] Now, lawmakers have more discretion in determining the meaning of this term which gives them the discretion to disregard factors that may impact species several decades from now, such as climate change and rising sea levels.[xix]

Further, the new rules state that species categorized as “threatened” will no longer receive the same protections as their “endangered” counterparts. Currently, when a species is listed as threatened, the species receives identical protections to species that are listed as endangered. Now, protections will be determined on a case by case basis which allows for the administrative agencies to strip vital protections for animals that they have determined are threatened but not endangered.[xx] This change, in conjunction with the added discretion given to policymakers in listing determinations, gives the agencies much more authority to change a species listing and, in turn, cut off protections.

Additionally, the administration announced that designation of critical habitat will focus on areas already occupied by a listed species.[xxi] Critical habitats are the “collective areas considered essential to protect a threatened or endangered species.”[xxii] The new rules add regulatory burdens and a heightened standard for unoccupied areas to be designated as a critical habitat.[xxiii] This change could reduce the number of unoccupied critical habitats where species of animals and plants could be transferred if their previous location became unsuitable for continued safety.

Overall, the Trump administration’s changes to the ESA could have devastating effects on several species of plants and animals. The administration’s assault on the environment continues. The changes weaken protections for threatened species and make it exceedingly more difficult to protect animals from long term threats like the climate crisis. Allowing economic factors and politics to seep

into ESA enforcement is short-sided and unfair to the environment. Environmental protection should take precedence over money. In the near future, expect to see challenges coming from environmental groups and democratic state attorneys general.

[i] See Endangered Species Act of 1973, 16 U.S.C.A. § 1531 (LexisNexis 2019).

[ii] *Endangered Species Act | Overview*, U.S. Fish & Wildlife Serv. (last visited on Sep. 24, 2019), <https://www.fws.gov/endangered/laws-policies/> [<https://perma.cc/2NGE-FNWX>].

[iii] Endangered Species Act of 1973, 16 U.S.C.A. § 1538 (LexisNexis 2019).

[iv] See Endangered Species Act of 1973, 16 U.S.C.A. § 1533 (LexisNexis 2019).

[v] Endangered Species Act of 1973, 16 U.S.C.A. § 1532 (LexisNexis 2019).

[vi] Endangered Species Act of 1973, 16 U.S.C.A. § 1532 (LexisNexis 2019).

[vii] Daisy Hernandez, *8 Amazing Species That Were Saved by the Endangered Species Act*, Popular Mech. (Aug. 14, 2019), <https://www.popularmechanics.com/science/animals/g28686852/endangered-species-act/> [<https://perma.cc/3KZA-9L96>].

[viii] Jessica A. Knoblauch, *Extinction Crisis Looms as Trump Attacks Endangered Species Act*, Earthjustice (Aug. 15, 2019), https://earthjustice.org/blog/2019-august/endangered-species-act-trump-attacks-extinction-drew-caputo?utm_source=twitter&utm_medium=social [<https://perma.cc/34UX-3LMZ>].

[ix] Hernandez, *supra* note vii.

[x] See *ESA Implementation | Regulation Revisions*, U.S. Fish & Wildlife Serv., (last visited on Sep. 24, 2019), https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html [<https://perma.cc/WL36-GKYE>].

[xi] 50 C.F.R. § 424 (2019).

[xii] Norman A. Bishop, *Endangered Species Act Revisions are Ill-Advised*, Bozeman Daily Chronicle (Sep. 17, 2019), https://www.bozemandailychronicle.com/opinions/letters_to_editor/endangered-species-act-revisions-are-ill-advised/article_eaf175a4-1691-57c8-b787-03a73bbdf156.html [<https://perma.cc/4TXE-UEDG>].

[xiii] Andy McGlashen, *Science Loses Ground to Economics With New Endangered Species Act Rules*, Audubon (Sep. 17, 2019), <https://www.audubon.org/news/science-loses-ground-economics-new-endangered-species-act-rules> [<https://perma.cc/CG8Q-8FKW>].

[xiv] *Id.*

[xv] 50 C.F.R. § 424 (2019).

[xvi] Jason Mark, *You Can't Put a Price Tag on Life*, Sierra (Sep. 16, 2019), <https://www.sierraclub.org/sierra/you-can-t-put-price-tag-life> [<https://perma.cc/VLE5-XSSU>].

[xvii] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

[xviii] 50 C.F.R. § 424 (2019).

[xix] Brigit Katz, *Trump Administration Overhauls How the Endangered Species Act Is Enforced*, Smithsonian (Aug. 13, 2019), <https://www.smithsonianmag.com/smart-news/trump-administration-has-overhauled-endangered-species-act-180972890/> [<https://perma.cc/WQG5-MQD6>].

[xx] *Id.*

[xxi] 50 C.F.R. § 424 (2019).

[xxii] Ula Chrobak, *Trump is Attacking the Endangered Species Act When We Need It Most*, Popular Sci. (Aug. 13, 2019), <https://www.popsci.com/endangered-species-act-weakened-trump/> [<https://perma.cc/RBD8-WT97>].

[xxiii] *Trump Administration Improves the Implementing Regulations of the Endangered Species Act*, U.S. Fish & Wildlife Serv. (Aug. 12, 2019),

https://www.fws.gov/news/ShowNews.cfm?ref=trump-administration-improves-the-implementing-regulations-of-the-&_ID=36443 [<https://perma.cc/VA4P-PASU>].

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