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THE ENDANGERED SPECIES ACT: DOES  
THE BLANKET RULE PROTECT ANIMAL OR  
HUMAN INTERESTS?

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## I. INTRODUCTION

The Endangered Species Act (“ESA”) was first passed by Congress in 1973.<sup>1</sup> “The purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend.”<sup>2</sup> The ESA was passed in response to President Nixon’s conservation initiative, which emphasized preventing the extinction of species.<sup>3</sup> Now more than ever, human activities are a major threat to species extinction.<sup>4</sup> Currently, we are “facing an extinction crisis.”<sup>5</sup> If action is not taken to further protect species, the global rate of species loss will accelerate.<sup>6</sup> Presently, the rate of extinction is “at least tens to hundreds of times higher than it was averaged over the past 10 million years.”<sup>7</sup> Indeed, nearly one million species are facing extinction within the next few decades.<sup>8</sup>

One of the changes made to the ESA, the elimination of the “blanket rule,” makes it more difficult to protect threatened species.<sup>9</sup>

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<sup>1</sup> 16 U.S.C.S. § 1531 (LexisNexis 1973); *Endangered Species Act: Overview*, U.S. FISH & WILDLIFE SERV. (Jan. 30, 2020), <https://www.fws.gov/endangered/laws-policies/index.html> [<https://web.archive.org/web/20220211074723/https://www.fws.gov/endangered/laws-policies/index.html>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> SANDRA DIAZ ET AL., INTERGOVERNMENTAL SCI.-POL’Y PLATFORM ON BIODIVERSITY & ECOSYSTEM SERVS., THE GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES: SUMMARY FOR POLICYMAKERS 3, 11 (Manuela Carneiro da Cunha et al. eds., 2019).

<sup>5</sup> *As Scientists Warn of Biodiversity Crisis, Trump Administration Guts Endangered Species Act*, NAT. RES. DEF. COUNCIL (Aug. 12, 2019), <https://www.nrdc.org/experts/nrdc/scientists-warn-biodiversity-crisis-trump-administration-guts-endangered-species-act> [<https://web.archive.org/web/20220124023501/https://www.nrdc.org/experts/nrdc/scientists-warn-biodiversity-crisis-trump-administration-guts-endangered-species-act>].

<sup>6</sup> DIAZ ET AL., *supra* note 4, at 12.

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

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

<sup>9</sup> *As Scientists Warn of Biodiversity Crisis, Trump Administration Guts Endangered Species Act*, *supra* note 5; see also Jonathan Wood, *The New Endangered Species Act Rules, Explained*, PROP. & ENV’T RSCH. CTR. (Aug.

Under the interpretation prior to the change by the Trump administration, threatened species were given the same protections as endangered species in an effort to prevent population loss before it became irreversible.<sup>10</sup> Unfortunately, the ESA no longer extends this blanket rule protection.<sup>11</sup>

This note will discuss the impacts of the of the blanket rule rollback on both humans and animals.<sup>12</sup> First, I will discuss the Endangered Species Act in Part II by examining the history of the ESA, describing the blanket rule, and discussing the successes of the ESA. Next, in Part III, I will explore the blanket rule in more detail – explaining what it is as well as the change and the potential impacts. Then, Part IV will highlight the issues of the ESA and species-specific rules. Finally, in Part V, I will examine why these protections are important for safeguarding species.

## II. THE ENDANGERED SPECIES ACT

In 1973, following a global conference in Washington D.C. regarding international trading of plants and animals, Congress passed the Endangered Species Act of 1973.<sup>13</sup> The purpose of the ESA is to protect and recover species that are at risk of extinction and rehabilitate their ecosystems.<sup>14</sup> The Interior Department’s U.S. Fish and Wildlife Service (“FWS”) and the Commerce Department’s National Marine Fisheries Services (“NMFS”) are in charge of administering the ESA.<sup>15</sup>

Under the ESA, species are listed as either “endangered” or “threatened.”<sup>16</sup> “‘Endangered’ refers to a species in danger of extinction

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14, 2019), <https://www.perc.org/2019/08/14/the-new-endangered-species-act-rules-explained/>.

<sup>10</sup> *As Scientists Warn of Biodiversity Crisis, Trump Administration Guts Endangered Species Act*, *supra* note 5.

<sup>11</sup> *See id.*

<sup>12</sup> While the ESA covers “plants” and “animals” under the term “species,” I will predominantly use the term “species” to refer to animals since this note is focused on the impacts of the blanket rule on animals.

<sup>13</sup> *Endangered Species: About Us*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/esa-history.html> [<https://web.archive.org/web/20220219163314/https://www.fws.gov/endangered/laws-policies/esa-history.html>] (last updated Jan. 30, 2020).

<sup>14</sup> U.S. FISH & WILDLIFE SERV., *ESA BASICS: 40 YEARS OF CONSERVING ENDANGERED SPECIES* (2017), <https://constantine.typepad.com/files/the-esa-fact-sheet.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

throughout all or a significant portion of its range.”<sup>17</sup> “‘Threatened’ means a species is likely to become endangered within the foreseeable future.”<sup>18</sup> All species of plants and animals are eligible to be listed as an endangered or threatened species.<sup>19</sup> When determining how a species should be listed, the FWS considers five factors: (1) damage or destruction of a habitat; (2) overuse of a species for commercial, recreational, scientific, or education purposes; (3) disease or predation; (4) inadequate existing protection; and (5) other natural or human factors that affect the species.<sup>20</sup> The ESA provides protection for endangered and threatened species in two ways. First, it prohibits “taking” of listed animals as well as interstate and international trade of listed animals without a federal permit; and second, it prohibits federal actions that could harm listed species or harm designated critical habitats.<sup>21</sup>

When animals are listed as threatened or endangered, the goal of the government is to rehabilitate the population.<sup>22</sup> Once populations are rehabilitated, the hope is that it creates a ripple effect.<sup>23</sup> Each species is part of a larger ecosystem that can only work properly if all species are functioning correctly.<sup>24</sup> Once an endangered or threatened species is restored to a healthy population, it can contribute to the health of the ecosystem.<sup>25</sup>

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<sup>17</sup> *Endangered Species Act: Overview*, *supra* note 1.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> U.S. FISH & WILDLIFE SERV., *supra* note 14.

<sup>21</sup> *Id.* (“Take is defined as ‘to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.’”); *What Does Take Mean Under the Endangered Species Act and What Is Incidental Take?*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <https://www.fisheries.noaa.gov/node/8051> (last visited Mar. 30, 2020).

<sup>22</sup> Sarah Engler, *10 Things You Didn’t Know About the Endangered Species Act*, NAT’L RES. DEF. COUNCIL (Aug. 21, 2015),

[https://www.nrdc.org/stories/10-things-you-didnt-know-about-endangered-species-act?gclid=Cj0KCQjwufn8BRCwARIsAKzP6971JB4GgjD8b6jPkvHPPNkFKhqfw\\_0SZTH-6jyu72o8Csddr2uUWs0aAsWzEALw\\_wcB](https://www.nrdc.org/stories/10-things-you-didnt-know-about-endangered-species-act?gclid=Cj0KCQjwufn8BRCwARIsAKzP6971JB4GgjD8b6jPkvHPPNkFKhqfw_0SZTH-6jyu72o8Csddr2uUWs0aAsWzEALw_wcB).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

### A. The Evolution of the Endangered Species Act

Congress first took steps to protect endangered species when it passed the Endangered Species Preservation Act in 1966.<sup>26</sup> The Endangered Species Preservation Act's purpose was to protect the listed species and their respective habitats.<sup>27</sup> The Endangered Species Preservation Act was also inspired by the declining number of Bald Eagles, which was experiencing an extreme decrease in population.<sup>28</sup> In 1969, Congress amended the Endangered Species Preservation Act to prohibit importing and selling endangered species.<sup>29</sup> Congress also changed the Act's name to the Endangered Species Conservation Act and called for a global meeting to devise a plan to conserve endangered species.<sup>30</sup>

In 1973, eighty nations gathered in Washington D.C. to sign the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").<sup>31</sup> CITES was meant to monitor and restrict international commerce of plants and animals harmed by trade.<sup>32</sup>

Congress passed the Endangered Species Act later that year.<sup>33</sup> Some of the key points of the ESA was that it defined what it meant for a species to be endangered or threatened, extended protection to plants and all invertebrates, extended protections to threatened species, required federal agencies to contribute to conservation of listed species, and prohibited federal agencies from harming listed species.<sup>34</sup>

In 1975, the Interior Department issued the blanket rule.<sup>35</sup> This rule extended the protections of endangered species to threatened species unless a species-specific rule was adopted instead.<sup>36</sup> This rule made endangered and threatened species essentially equal.<sup>37</sup>

In 1978, Congress made the first amendment to the ESA.<sup>38</sup> A few notable changes included changing the definition of "species" to

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<sup>26</sup> U.S. FISH & WILDLIFE SERV., *supra* note 14.

<sup>27</sup> *Id.*

<sup>28</sup> Engler, *supra* note 22.

<sup>29</sup> U.S. FISH & WILDLIFE SERV., *supra* note 14.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Wood, *supra* note 9.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> U.S. FISH & WILDLIFE SERV., *supra* note 14.

only include vertebrates as well as critical habitats being concurrently listed with a species.<sup>39</sup> In 1982, Congress again amended the ESA to prohibit economic considerations when determining the status of species, to prohibit removal of endangered plants from its land, and to implement habitat conservation plans to name a few.<sup>40</sup> Some of the changes brought by the 1988 amendment included monitoring candidate and recovering species, implementing emergency listings when a species was a significant risk, and extending protection for endangered plants to include a prohibition against “malicious destruction” on federal land.<sup>41</sup> Finally, the last amendment in 2004 “exempted the Department of Defense from critical habitat designations so long as an integrated natural resources management plan” was prepared and accepted by the Secretary of the Interior in accordance with the National Defense Authorization Act.<sup>42</sup>

### **B. The “Blanket Rule” Provision of the Endangered Species Act Extends Endangered Species Protections to Threatened Species**

Congress consistently tries to weaken the ESA through legislation – sometimes overtly and sometimes covertly – and the blanket rule is no exception.<sup>43</sup> The blanket rule extends the same protections that endangered species are given to threatened species, which gives threatened species a chance to recover and improve before they find themselves on the endangered species list.<sup>44</sup> The FWS points

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<sup>39</sup> *Endangered Species Act 1978 Amendments*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/node/266479> (last visited Mar. 22, 2022).

<sup>40</sup> *Endangered Species Act 1982 Amendments*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/node/266480> (last visited Mar. 30, 2022).

<sup>41</sup> *Endangered Species Act: A History of the Endangered Species Act of 1973: 1988 ESA Amendment*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/esa-1988.html> [<https://web.archive.org/web/20220211075005/https://www.fws.gov/endangered/laws-policies/esa-1988.html>] (last updated Jan. 30, 2020).

<sup>42</sup> *Endangered Species Act: A History of the Endangered Species Act of 1973: 2004 ESA Amendment*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/esa-2004.html> [<https://web.archive.org/web/20200121011241/https://www.fws.gov/endangered/laws-policies/esa-2004.html>] (last updated Dec. 11, 2018).

<sup>43</sup> Engler, *supra* note 22.

<sup>44</sup> *As Scientists Warn of Biodiversity Crisis, Trump Administration Guts Endangered Species Act*, *supra* note 5; see also Wood, *supra* note 9.

out that the most cost-effective method to conserve a species is to prevent it from becoming endangered or threatened in the first place.<sup>45</sup>

The language of the applicable section of the ESA provides:

**(d) Protective regulations.** Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) [16 USCS § 1538(a)(1)], in the case of fish or wildlife, or section 9(a)(2) [16 USCS § 1538(a)(2)], in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act [16 USCS § 1535(c)] only to the extent that such regulations have also been adopted by such State.<sup>46</sup>

The relevant language that extended the same protections to threatened species as endangered species is “the Secretary shall issue such regulations as deemed necessary.”<sup>47</sup> This language gives the Secretary the power to simply extend protections given to endangered species to threatened species. Therefore, the change is one of interpretation. Administrators are now mandating that this clause be interpreted as the Secretary issuing species-specific rules as opposed to issuing a blanket rule for all threatened species.<sup>48</sup>

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<sup>45</sup> *Defining Success under the Endangered Species Act*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/news/episodes/bu-04-2013/coverstory/index.html> [<https://web.archive.org/web/20210224001808/https://www.fws.gov/endangered/news/episodes/bu-04-2013/coverstory/index.html>] (last updated July 12, 2013).

<sup>46</sup> 16 U.S.C.S. § 1533(d) (LexisNexis 1973).

<sup>47</sup> *Id.*

<sup>48</sup> Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753, 44,753 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 17) [hereinafter Endangered and Threatened Wildlife and Plants].



### C. The Endangered Species Act Saved Countless Species from Extinction<sup>49</sup>

The ESA is often criticized because not many species have been removed from the endangered and threatened species lists.<sup>50</sup> However, species are delisted only when they have recovered to such a degree that their survival no longer depends on the protections provided under the ESA.<sup>51</sup> Decisions to delist a species are delicate as the species will, of course, lose all protections of the ESA upon delisting.<sup>52</sup>

In reality, “the ESA is one of the country’s most effective conservation measures, saving 99 percent of the species it lists from extinction and pulling iconic species . . . back from the brink.”<sup>53</sup> Scientists estimate that at least 227 species would have likely gone extinct if the ESA had not been enacted.<sup>54</sup> Additionally, at least 110 species have recovered significantly since the ESA was passed.<sup>55</sup> Furthermore, of all of the species listed in the northeastern United States, “Ninety-three percent (93%) are stable or improving and more

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<sup>49</sup> See *The Endangered Species Act: A Wild Success Story*, CTR. FOR BIOLOGICAL DIVERSITY, [https://www.biologicaldiversity.org/campaigns/esa\\_wild\\_success/](https://www.biologicaldiversity.org/campaigns/esa_wild_success/) [[https://web.archive.org/web/20220306173627/https://www.biologicaldiversity.org/campaigns/esa\\_wild\\_success/](https://web.archive.org/web/20220306173627/https://www.biologicaldiversity.org/campaigns/esa_wild_success/)] (last updated Mar. 6, 2022), for an example of success species’ success stories under the ESA. See also Lisa Feldkamp, *What Has the Endangered Species Act Ever Done for Us? More Than You Think.*, COOL GREEN SCI. (May 8, 2017), <https://blog.nature.org/science/2017/05/08/what-endangered-species-act-done-effective-extinction-conservation/> [<https://web.archive.org/web/20220302220847/https://blog.nature.org/science/2017/05/08/what-endangered-species-act-done-effective-extinction-conservation/>], for more success stories of the ESA.

<sup>50</sup> *Defining Success under the Endangered Species Act*, *supra* note 45.

<sup>51</sup> *Id.*

<sup>52</sup> Natasha Daly, *Meet the American Animals That Bounced Back in 2019*, NAT’L GEOGRAPHIC (Dec. 17, 2019), <https://www.nationalgeographic.com/animals/2019/12/species-delisted-from-endangered-species-act-in-2019/> [<https://web.archive.org/web/20201130095558/https://www.nationalgeographic.com/animals/2019/12/species-delisted-from-endangered-species-act-in-2019/>] (explaining that once species are delisted, the species is still monitored for the next five years).

<sup>53</sup> *As Scientists Warn of Biodiversity Crisis, Trump Administration Guts Endangered Species Act*, *supra* note 5.

<sup>54</sup> *The Endangered Species Act: A Wild Success Story*, *supra* note 49.

<sup>55</sup> *Id.*

than eight percent (80%) are meeting the recovery targets established in federal recovery plans.”<sup>56</sup>

The FWS asserts that the most complete measure of success of the ESA is observing the number of listed species that are no longer declining in population, have stable populations, or have “gained a solid foothold on the path toward recovery.”<sup>57</sup> As of July 12, 2013, twenty-seven species that were listed as endangered have been moved to the threatened species list showing improvement.<sup>58</sup> Additionally, there are almost sixty other species that will soon be eligible to be moved from the endangered species list with about half being reclassified as threatened and the other half being delisted.<sup>59</sup>

There are many success stories of species greatly improving because of the protections extended to it under the ESA.<sup>60</sup> The Tinian monarch, a small, flycatching songbird typically only six inches long, is just one success story from the ESA.<sup>61</sup> This bird only lives on six hundred acres of forest on the small island of Tinian, which is part of the Mariana archipelago.<sup>62</sup> Introduced second growth and well-developed native forests are the preferred habitats of the Tinian monarch, but it has had to adapt to shrubby legume due to

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<sup>56</sup> *Id.*

<sup>57</sup> *Defining Success under the Endangered Species Act*, *supra* note 45.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Feldkamp, *supra* note 49; *see also 10 Animals That Are No Longer on the Endangered List*, G ADVENTURES (Apr. 16, 2018), <https://www.gadventures.com/blog/animals-no-longer-endangered/> [<https://web.archive.org/web/20201109015116/https://www.gadventures.com/blog/animals-no-longer-endangered/>] (giving examples of species that improved while on the endangered species list and successfully came off the endangered species list).

<sup>61</sup> *Tinian Monarch*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/environment/science-magazines/tinian-monarch> [<https://web.archive.org/web/20210121030113/https://www.encyclopedia.com/environment/science-magazines/tinian-monarch>] (last updated Feb. 19, 2021).

<sup>62</sup> *Saving the Tinian Monarch*, CTR. FOR BIOLOGICAL DIVERSITY, [https://www.biologicaldiversity.org/species/birds/Tinian\\_monarch/index.html](https://www.biologicaldiversity.org/species/birds/Tinian_monarch/index.html) [[https://web.archive.org/web/20220102104430/https://www.biologicaldiversity.org/species/birds/Tinian\\_monarch/index.html](https://web.archive.org/web/20220102104430/https://www.biologicaldiversity.org/species/birds/Tinian_monarch/index.html)] (last updated Jan. 2, 2022).

deforestation.<sup>63</sup> The Tinian monarch was listed as endangered in 1970.<sup>64</sup> The songbird was nearly extinct when most of its habitat was cleared for agricultural use during World War II.<sup>65</sup> Due to protections put in place under the ESA, the Tinian monarch's population recovered, and the Tinian monarch was delisted in 2004.<sup>66</sup>

### **III. THE NEW INTERPRETATION OF THE ENDANGERED SPECIES ACT DISPENSES WITH THE BLANKET RULE**

#### **A. The Blanket Rule Extends Endangered Species Protections to Threatened Species**

As previously mentioned, the blanket rule extended protections that were given to endangered species to threatened species.<sup>67</sup> This allowed threatened species to receive strict enough protections that would hopefully prevent them from ever becoming endangered.

The use of the blanket rule implied that protections given to endangered species were also necessary in order to aid in the conservation efforts of threatened species.<sup>68</sup> It has always been the case that the Secretary must decide if a species, when listed as threatened, should receive species-specific protections or the same protections as endangered species.<sup>69</sup> However, up until this change, the Secretary typically issued a "blanket rule" that allowed threatened species to receive the same protections as endangered species.<sup>70</sup>

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<sup>63</sup> *Tinian Monarch*, *supra* note 61.

<sup>64</sup> *Saving the Tinian Monarch*, *supra* note 62.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *As Scientists Warn of Biodiversity Crisis, Trump Administration Guts Endangered Species Act*, *supra* note 5; *see also* Wood, *supra* note 9.

<sup>68</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,758.

<sup>69</sup> *Id.* at 44,758.

<sup>70</sup> *As Scientists Warn of Biodiversity Crisis, Trump Administration Guts Endangered Species Act*, *supra* note 5; *see also* Wood, *supra* note 9.

### **B. The Elimination of the Blanket Rule Weakens Protections for Threatened Species**

One of the changes being made to the ESA by the rollbacks includes eliminating the blanket rule for species listed as threatened in the future.<sup>71</sup> Threatened species will no longer be given the same, strict protections that are given to endangered species.<sup>72</sup> While the language of the statute is not changing, the implementation of the standards mandates the FWS to issue specific protections for threatened species.<sup>73</sup> This regulation became effective on September 26, 2019.<sup>74</sup>

In lieu of the blanket rule, the FWS will establish species-specific rules regarding the protection of threatened species.<sup>75</sup> In explaining these changes, lawmakers defend their decision by claiming this will make the process more efficient, predictable, and transparent “because it correlates with the [FWS]’s analysis of threats impacting the species to its analysis of protective regulations for the species.”<sup>76</sup> Furthermore, legislators seem to emphasize the administrative efficiencies and cost-savings this process provides.<sup>77</sup>

It has always been the case that the Secretary must decide if a species, when listed as threatened, should receive species-specific protections or the same protections as endangered species.<sup>78</sup> With the new change regarding the implementation of these rules, the Secretary will now always have to issue species-specific rules.<sup>79</sup> The Secretary no longer has the option of the blanket rule.<sup>80</sup> Lawmakers assert that they will issue the species-specific rules at the time of listing, relying on the analysis of stressors on the species and forms of “take” impacting the species.<sup>81</sup>

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<sup>71</sup> See Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,758.

<sup>72</sup> *Id.* at 44,755; see also Wood, *supra* note 9.

<sup>73</sup> See Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,758.

<sup>74</sup> *Id.* at 44,760.

<sup>75</sup> *Id.* at 44,758.

<sup>76</sup> *Id.* at 44,755.

<sup>77</sup> *Id.* at 44,755 (saying that the Fish & Wildlife Service has pointed out that it would actually be more cost effective to prevent a species from being listed in the first place); see also *Defining Success under the Endangered Species Act*, *supra* note 45.

<sup>78</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,758.

<sup>79</sup> *Id.* at 44,758.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 44,755.

Going forward, threatened species will only be given protections specifically listed by the government, if any are given.<sup>82</sup> Similarly, if an endangered species is down-graded to a threatened species, it will lose all of the endangered species protections.<sup>83</sup> The FWS will have to issue species-specific protections.<sup>84</sup> Given that the government has historically declined to issue species-specific protections, it is likely most species listed as threatened will be left unprotected and no better off than when they were not on the list.<sup>85</sup> Fortunately, species listed as threatened prior to this rollback will continue receiving the strict protections as endangered species.<sup>86</sup> The rule will only apply to newly listed species.<sup>87</sup>

The reasoning behind rolling back the blanket rule is so that prohibitions can be more focused on the stressors that cause species to be threatened.<sup>88</sup> Policymakers believe this will lead to stronger conservation efforts.<sup>89</sup> Lawmakers also sought to restore the distinction between endangered and threatened species.<sup>90</sup>

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<sup>82</sup> *The Edge of Extinction: Hundreds of Vulnerable Animal Species in Danger Under Endangered Species Act Rollbacks*, ANIMAL LEGAL DEF. FUND (Aug. 21, 2019), [https://aldf.org/article/the-edge-of-extinction-hundreds-of-vulnerable-animal-species-in-danger-under-endangered-species-act-rollbacks/?gclid=Cj0KCQjwufn8BRCwARIsAKzP697XKSMeiFLzMz3-oSvcQiIE\\_RJZFci4LtrBkf\\_17FqWZp-5M9hXfr4aAntwEALw\\_wcB](https://aldf.org/article/the-edge-of-extinction-hundreds-of-vulnerable-animal-species-in-danger-under-endangered-species-act-rollbacks/?gclid=Cj0KCQjwufn8BRCwARIsAKzP697XKSMeiFLzMz3-oSvcQiIE_RJZFci4LtrBkf_17FqWZp-5M9hXfr4aAntwEALw_wcB).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Wood, *supra* note 9.

<sup>87</sup> *Id.*

<sup>88</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,755.

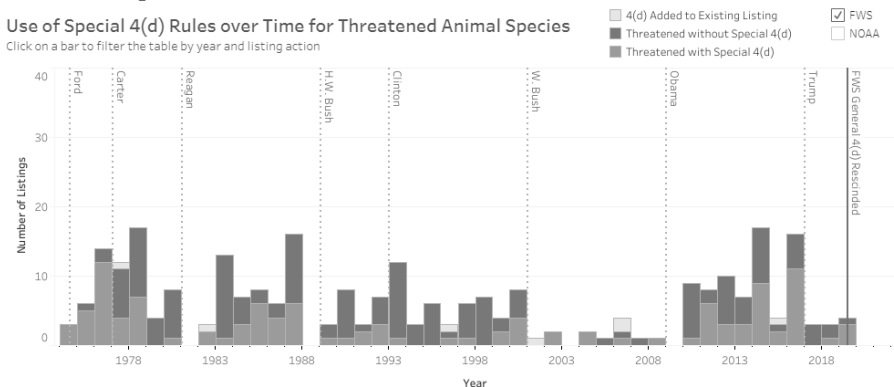
<sup>89</sup> *Id.*

<sup>90</sup> Wood, *supra* note 9.

### 1. Species-Specific Rules Will Be Issued with Express Protections for Threatened Species

Species-specific rules will be the new standard in lieu of the blanket rule.<sup>91</sup>

#### Graph 1<sup>92</sup>



Rule makers assert that species-specific rules for threatened species is consistent with the history of implementing the ESA.<sup>93</sup> In fact, the FWS has increasingly utilized species-specific rules in the last decade.<sup>94</sup> Using species-specific rules will allow protections to be tailored to the needs of the species, and, ultimately, lead to stronger conservation efforts.<sup>95</sup>

The protections included in species-specific rules are typically determined using a Species Status Assessment.<sup>96</sup> Under the assessment, the FWS takes into consideration the stressors that caused the species to become threatened.<sup>97</sup> Additionally, the FWS uses already existing rules as a model for the rule of the newly listed threatened species.<sup>98</sup>

<sup>91</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,753.  
<sup>92</sup> YA-WEI LI, ENV'T POL. INNOVATION CTR., 2019 REGULATORY CHANGES TO THE ENDANGERED SPECIES ACT 4 (2019), <https://agh.eli.org/sites/default/files/media/19-08-23-/8-23-19-lippt.pdf> (illustrating how often species-specific rules are assigned to threatened species).  
<sup>93</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,755.  
<sup>94</sup> *Id.* at 44,756.  
<sup>95</sup> *Id.* at 44,757.  
<sup>96</sup> *Id.* at 44,756.  
<sup>97</sup> *Id.*  
<sup>98</sup> *Id.* (showing that it is concerning that the government will base species-specific rules on other species-specific rules as these rules should not be one-size-fits-all, which is denoted by the use of “specific.”); *see generally* 50 C.F.R § 17.40 (2021) (illustrating examples of species-specific rules).

The Species Status Assessment, among other things, identifies primary factors that influence the biological status of these species.<sup>99</sup> The Species Status Assessment can be conducted at any time, but it is best before the candidate assessment or twelve-month finding stage.<sup>100</sup> It follows species to collect information regarding the biological status of the species.<sup>101</sup> The Species Status Assessment can be updated at any time and is a single document making it easy to use.<sup>102</sup> The early identification of the impacts on species give the FWS time to implement proper conservation efforts prior to any ESA decisions.<sup>103</sup>

The Species Status Assessment: (1) evaluates a species life history, habitat, and taxonomy; (2) “describes the current condition of the species’ habitat and demographics, and the probable explanations for past and ongoing changes in abundance and distribution within the species’ range”; and (3) forecasts impacts of future environmental conditions and conservation efforts.<sup>104</sup> Ultimately, the Species Status Assessment is interested in “resiliency, redundancy, and representation to evaluate the current and future condition of the species,” and the assessment provides decisionmakers with the best available scientific information regarding the species and its population.<sup>105</sup>

### **C. Lawmakers Are Predominantly Focused on Pleasing Landowners Instead of Protecting Animals**

One consideration by administrators in rolling back the blanket rule includes incentivizing landowners.<sup>106</sup> The assumption officials are working under is that landowners will be incentivized to take precautionary measures for endangered species so that the species may be down listed to threatened.<sup>107</sup> Once the species is down-listed to threatened, the landowners will be subject to less strict regulations

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<sup>99</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,755.

<sup>100</sup> *Species Status Assessments (SSA)*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/southeast/endangered-species-act/species-status-assessments/#> [<https://web.archive.org/web/20220130213413/https://www.fws.gov/southeast/endangered-species-act/species-status-assessments/>] (last visited Jan. 5, 2020).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,755.

<sup>107</sup> *Id.*

regarding the species.<sup>108</sup> Rule makers are hoping that these less strict regulations will incentivize landowners to assist in rehabilitating an endangered species so it can be downlisted to threatened.<sup>109</sup> However, it has been shown that incentive programs are not quite as effective as the government may think.<sup>110</sup> A landowner's old, species-damaging, procedures return when he is no longer incentivized by the government to nurture the species.<sup>111</sup>

A concern regarding the rollbacks is that "political interference and industry pressure" will influence the FWS in determining the appropriate protections for each species.<sup>112</sup> Additionally, there are concerns that economic factors will be heavily considered in listing species and determining protections.<sup>113</sup> However, officials continue to assert that decisions regarding the protections of threatened species will be based upon scientific and commercial information available to them.<sup>114</sup>

Additionally, there is a huge concern regarding whether the FWS has enough resources to be able to make well-informed and appropriate species-specific rules for threatened species.<sup>115</sup> Administrators respond by pointing out the number of species-specific rules that have been previously passed by the FWS.<sup>116</sup> Furthermore, they only expect to implement four species-specific rules per year, as opposed to an average of two rules per year in the past.<sup>117</sup> Rule makers further state that setting species-specific rules are more resource efficient.<sup>118</sup>

Some people are worried that these species-specific rules will not encourage private landowners to implement strategies to conserve

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 44,755, 44,760; compare 50 C.F.R. § 17.31 (2021), with 50 C.F.R. § 17.31 (2018).

<sup>110</sup> Eric T. Freyfogle, *A Sand County Almanac at 50: Leopold in the New Century*, 30 ENV'T L. REP. NEWS & ANALYSIS 10,058, 10,061 (2000).

<sup>111</sup> *Id.*

<sup>112</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,755.

<sup>113</sup> *As Scientists Warn of Biodiversity Crisis, Trump Administration Guts Endangered Species Act*, *supra* note 5.

<sup>114</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,755.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (noting examples of how resources are being conserved by implementing species specific rules including issuing less permits, streamlined consultations, and further encourage conservation efforts).



threatened species.<sup>119</sup> Policymakers defend this accusation by pointing out that every regulation will be subject to the public's comments and input before implementation.<sup>120</sup> The opportunity for public comment allows landowners to participate in the process and give their input on the regulations.<sup>121</sup> This process allows the FWS to develop rules that will satisfy landowners who will undoubtedly be advocating for weak protections. Furthermore, rule makers hope to incentivize landowners to conserve endangered species in order to down-list the species to threatened so that the restrictions will be weaker.<sup>122</sup> Additionally, officials hope that by pointing out the specific activities that are harming the threatened species, private citizens and landowners will be more proactive about conserving and taking care of the species.<sup>123</sup>

Finally, a general theme from the Trump Administration is deregulation,<sup>124</sup> and the ESA is no exception to this. Trump's regulations, or lack thereof, is largely geared towards helping his friends and "punishing his enemies."<sup>125</sup> The administration struggled to prove positive economic and social impacts from its regulatory actions.<sup>126</sup> The ESA is no exception to this unbalanced cost-benefit analysis. Trump's "friends" – landowners and developers – will greatly benefit from weaker protections for species listed as threatened, and this was undoubtedly a consideration in rolling back the blanket rule.

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<sup>119</sup> *Id.*

<sup>120</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,757.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Charles S. Clark, *The Trump Administration's War on Regulations*, GOV'T EXEC., <https://www.govexec.com/feature/trump-administrations-war-regulations/> (last visited Feb. 21, 2021).

<sup>125</sup> Catherine Rampell, Opinion, *Trump is All About Deregulation – Except When it Comes to His Enemies*, WASH. POST (May 28, 2020), [https://www.washingtonpost.com/opinions/trump-is-all-about-deregulation--except-when-it-comes-to-his-enemies/2020/05/28/dcfb9638-a116-11ea-b5c9-570a91917d8d\\_story.html](https://www.washingtonpost.com/opinions/trump-is-all-about-deregulation--except-when-it-comes-to-his-enemies/2020/05/28/dcfb9638-a116-11ea-b5c9-570a91917d8d_story.html).

<sup>126</sup> *Id.* In some situations, the Trump administration's analysis shows negative social and economic costs that are ignored because the costs are imposed on people Trump does not like. *See id.*

#### IV. ISSUES WITH THE IMPLEMENTATION OF THE ENDANGERED SPECIES ACT AND SPECIES-SPECIFIC RULES

##### A. The Endangered Species Act is Implemented with Humans in Mind Instead of Animals

Generally, the Trump Administration has decided that “regulations are out of control and should be pared back.”<sup>127</sup> Trump’s deregulation agenda seems to emphasize costs to regulations without considering the benefits.<sup>128</sup> In fact, many decisions are being made without consulting or seeking advice from experts.<sup>129</sup>

Some of the considerations in changing the implementation of 4(d) of the ESA include predictability, certainty, and using less burdensome tools to implement regulations.<sup>130</sup> Notably missing from policymakers’ considerations is how these changes impacts the animals. While they claim this will encourage conservation efforts, this also seems to be an afterthought by officials. Throughout the responses to concerns of the public, administrators continuously emphasize the administrative efficiencies these changes will bring as well as the relief landowners and private citizens will feel from more relaxed regulations.<sup>131</sup> Therefore, it seems that lawmakers are less concerned by the impacts of this change on the species.

Rule makers continually repeat the same line that species will benefit from the change because specific stressors will be identified without any other thoughts on the matter.<sup>132</sup> Identifying stressors in creating species-specific rules seems to be the only real benefit to species legislators can come up with while the government has expressed many benefits to humans regarding this change.<sup>133</sup> Officials go so far as to state that “the [FWS] is...the only entity that is directly affected by this final regulation.”<sup>134</sup> A drastic change in issuing regulations for species will undoubtedly impact species, as these very rules are promulgated only because of the species. Therefore, the species suffering from this change in implementation will actually be

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<sup>127</sup> Clark, *supra* note 124.

<sup>128</sup> *See id.*

<sup>129</sup> *See id.*

<sup>130</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,755.

<sup>131</sup> *Id.* at 44,757.

<sup>132</sup> *See id.* at 44,754-55.

<sup>133</sup> *See generally id.* at 44,753-60. (responding to comments that identifying stressors in species-specific rules is beneficial to humans).

<sup>134</sup> *Id.* at 44,758-59.

most affected. To say the FWS will be most affected is to say that these species do not matter that much.

While no species that has been delisted has ever been relisted, the Center for Biological Diversity claimed in 2013 that the Tinian monarch should be considered for relisting.<sup>135</sup> Although its population recovered and was delisted in 2004, the Tinian monarch's population now faces a new, manmade, threat.<sup>136</sup> The U.S. Marine Corps planned to build a training facility in the middle of the Tinian monarch's habitat, which is threatening its existence.<sup>137</sup> Additionally, urban development and agricultural initiatives are taking the Tinian monarch's habitat away and harming the population.<sup>138</sup> The Tinian monarch only exists on the island of Tinian, so if the songbird goes extinct on that island, it will forever be extinct.<sup>139</sup> The success story of the Tinian monarch shows how exciting it is when a species' population recovers, but once the species is delisted, humans seem to forget about the species. There is no point in working so hard to protect these species when they are vulnerable if we are going to revert to practices that harm them once the species have recovered.

As previously mentioned, decisionmakers hope that by implementing species-specific rules for threatened species, as opposed to using the blanket rule, will incentivize landowners.<sup>140</sup> The thought is that landowners will do all they can to help rehabilitate endangered species so that they can be down listed as threatened.<sup>141</sup> The result of down listing a species would mean weaker protections for these species on that person's land.<sup>142</sup>

There does not seem to be a reason to list species at all if the goal is to extend the weakest protections possible to ameliorate landowners. Perhaps it is true that the landowners will work hard to rehabilitate the species, and this will be good for the species. However, once the weaker regulations are put in place regarding the species, landowners will probably stop trying to rehabilitate and nurture the species. Just because

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<sup>135</sup> Daly, *supra* note 52.

<sup>136</sup> *Id.*

<sup>137</sup> *See id.* The petition by the Center for Biodiversity was ultimately denied, and the Marine Corps was allowed to continue with its training facility. *See id.*

<sup>138</sup> *Saving the Tinian Monarch*, *supra* note 62.

<sup>139</sup> *Tinian Monarch*, *supra* note 61.

<sup>140</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,755.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

a species is “threatened” and not “endangered” does not mean the species is rehabilitated. A threatened species is just that – threatened. It still deserves to be watched carefully so it does not backslide to endangered. Furthermore, it is clear the landowner is simply working for his own interest and gain. The landowner is not working hard to rehabilitate the species for the benefit of the species, the landowner is working to rehabilitate the species so that he does not have to worry about getting in trouble for disregarding the species later.

Additionally, legislators make the effort to point out that economic impacts from the rule will be minimal for most.<sup>143</sup> Economic impacts on private citizens should be the least of lawmakers’ concerns when making policy that is supposed to protect animals. Furthermore, as of the 1982 amendment, officials were not supposed to take economic considerations into account when determining if a species should be listed.<sup>144</sup> This same prohibition should be extended to decisions regarding the protections of a species following the decision to list.

### **B. Many Human Actions are Exempted from Species-Specific Rules Further Weakening Protections for Threatened Species**

Species-specific rules will be the new standard for governing the protections for threatened species.<sup>145</sup> However, species-specific rules often provide for exemptions that reduce protections and restrictions for threatened species.<sup>146</sup> While most rules include several types of exemptions, these exemptions can generally be broken down into seven categories: (1) conservation and research; (2) non-conservation activities specified in a rule; (3) activities authorized by a voluntary conservation plan; (4) activities regulated by state law; (5) activities

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<sup>143</sup> *Id.* at 44,758.

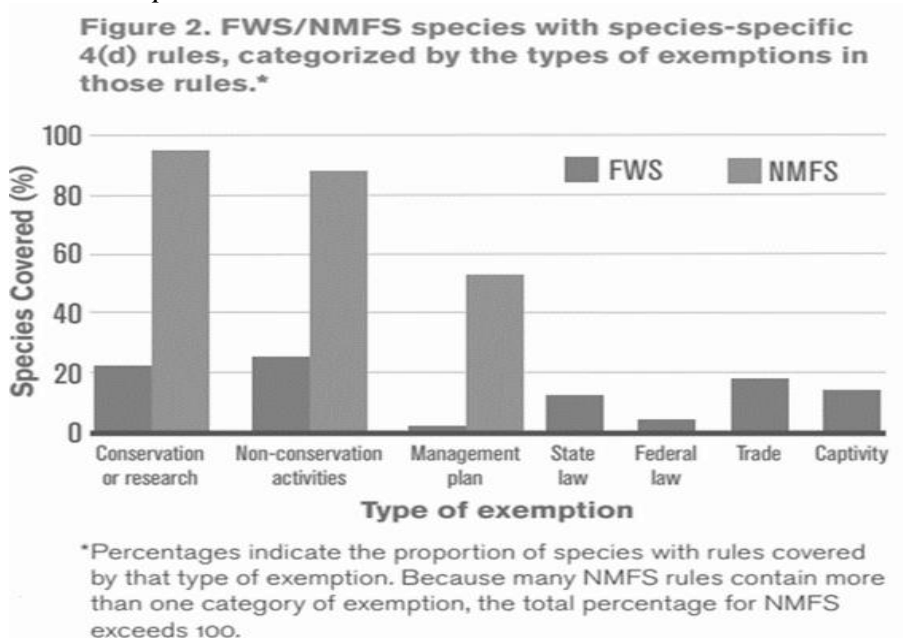
<sup>144</sup> *Endangered Species Act: A History of the Endangered Species Act of 1973*, U.S. FISH & WILDLIFE SERV. (Jan. 30, 2020), <https://www.fws.gov/endangered/laws-policies/esa-history.html> [<https://web.archive.org/web/20220219163314/https://www.fws.gov/endangered/laws-policies/esa-history.html>].

<sup>145</sup> *Endangered and Threatened Wildlife and Plants*, 84 Fed. Reg. at 44,753; *see also infra Graph 1* (showing how often species-specific rules are assigned to threatened species).

<sup>146</sup> YA-WEI LI, DEFS. WILDLIFE, NO. 4, SECTION 4(D) RULES: THE PERIL AND THE PROMISE 7 (2017).

regulated by other federal laws; (6) wildlife trade; and (7) captive animals.<sup>147</sup>

Graph 2<sup>148</sup>



The first category focuses on rules that exempt scientific research and conservation efforts.<sup>149</sup> Most rules that include this exemption exempt all scientific research while some only exempt scientific or conservation activities permitted by the state.<sup>150</sup> For example, a grizzly bear may only be taken from the wild for scientific and research purposes with the caution that the grizzly bear may not be permanently injured or killed.<sup>151</sup> The FWS rationalizes this exemption because scientific research with an eye towards conservation should be encouraged.<sup>152</sup> While I do not disagree with the need for scientific research for the purpose of uncovering and rectifying the harms caused to the animals, I am cautious that humans imposing themselves on species’ habitats could still be harmful to the species.

<sup>147</sup> *Id.* at 7-10.

<sup>148</sup> *Id.* at 10 fig. 2 (graph reproduced from the source) (illustrating the frequency with which each exception is used when creating species-specific rules).

<sup>149</sup> *Id.* at 7.

<sup>150</sup> *Id.*

<sup>151</sup> 50 C.F.R. § 17.40 (2021).

<sup>152</sup> LI, *supra* note 148, at 7-8.

Exemptions for non-conservation activities, the second category, are the most common exemptions.<sup>153</sup> For example, Alaskan indigenous people may use northern sea otters' skins to create household and other hand-made products.<sup>154</sup> These exemptions seem to be in contradiction with the point of the ESA as it seems to promote, or at least accept, harm caused to the threatened species that the ESA is supposed to protect. Rules with these exemptions "may even result in considerable loss to certain populations."<sup>155</sup> However, the FWS maintains that these exemptions are valuable tools that will encourage conservation.<sup>156</sup>

The third category includes activities authorized by a voluntary conservation plan.<sup>157</sup> This means that "the plans, rather than the special rule, describe the authorized land development and conservation measures."<sup>158</sup> The FWS has only issued a species-specific rule in this category twice.<sup>159</sup> The lesser prairie chicken rule exempted "all incidental take resulting from activities on nonfederal lands that are covered by a conservation plan spanning the species' entire range."<sup>160</sup>

The fourth category exempts activities regulated by state law from the take prohibition.<sup>161</sup> Species-specific rules for fish are typically subject to this categorization, and the exemptions usually target fishing for sport with the rationale that it prevents overpopulation.<sup>162</sup> This is confusing, however, because if a species is listed as threatened, it likely is not prone to overpopulation. For species residing in states where this exemption is applicable, states hold a lot of power in determining the protections granted to the species.<sup>163</sup> However, this category of exemptions is rarely used anymore.<sup>164</sup>

Other federal laws that can exempt certain conservation activities make up the fifth category.<sup>165</sup> For example, the species-

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<sup>153</sup> *Id.* at 8.

<sup>154</sup> 50 C.F.R. § 17.40.

<sup>155</sup> LI, *supra* note 148, at 8.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 9.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> LI, *supra* note 148, at 10.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* All of the rules that fall into the fourth category were issued between 1975 and 1987 and are still in effect. *Id.*

<sup>165</sup> *Id.*

specific rule for polar bears exempts activities otherwise permitted under the Marine Mammal Protection Act.<sup>166</sup> While the Marine Mammal Protection Act extends regulations and some protections regarding polar bears, it still authorizes the use of polar bears for certain things.<sup>167</sup> Again, the species health is a lower priority than the impact on humans.

The sixth category of exemptions covers wildlife trade.<sup>168</sup> For species that have commercial value, trade of animals or animal parts may be exempted, at least in part.<sup>169</sup> Additionally, imported and exported species may be exempted.<sup>170</sup> For example, “import, export, or re-export or sell or offer for sale, deliver, receive, carry transport, or ship in interstate or foreign commerce in the course of commercial activity [for] threatened crocodylian skins, parts, and products” may be permissible.<sup>171</sup> This is rationalized because these species have to meet requirements of other legislation governing imports and exports, so there is no need to add extra, redundant requirements.<sup>172</sup> However, if these regulations on imports and exports were enough, the populations would not be threatened or endangered. Therefore, these protections are not enough, and wildlife trade should not be exempted from ESA regulations. The wildlife trade exemption is an example of lawmakers’ concern for the economy taking priority over species’ survival.

The final category of exemptions covers captive animals.<sup>173</sup> Exemptions are granted for species often kept as pets or for research purposes.<sup>174</sup> For example, primates held in captivity, including their progeny, may remain in captivity.<sup>175</sup> Similar to the issues with wildlife trade, this shows the prioritization of the captive animals’ market over saving the species. Decisionmakers are more concerned with private

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<sup>166</sup> 50 C.F.R. § 17.40(q)(2) (2021).

<sup>167</sup> See Marine Mammal Protection Act, Pub. L. No. 92-522, 86 Stat. 1027, 1028 (1972). The Marine Mammal Protection Act was enacted to prevent the “taking and importing [of] marine mammals.” See *Marine Mammal Protection Act*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/marine-mammal-protection-act.html> (last visited Feb. 21, 2021).

<sup>168</sup> LI, *supra* note 148, at 10.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> 50 C.F.R. § 17.42 (2021).

<sup>172</sup> LI, *supra* note 148, at 10.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

citizens' ability to own and use threatened species for their own gain over the survival of the species.

## V. PROTECTIONS MATTER FOR ANIMALS IN ORDER TO PROTECT THE SPECIES AND THE ENVIRONMENT'S HEALTH

Protections for these animals are important. Humans should leave animals, especially wild animals, alone because human interference is often more harmful than helpful to the animals.<sup>176</sup> It is important for humans to work in harmony with the environment in accordance with Aldo Leopold's Land ethic concept.<sup>177</sup> When humans take a hands-off approach and learn to respect the environment, species' populations will flourish and be restored. Biodiversity is important so that the environment stays healthy and operates efficiently.<sup>178</sup>

All of these reasons demonstrate a need for humans to respect the environment in which we live, as well as the importance of protecting threatened species. If threatened species are not given proper protections, they may become endangered or oscillate between threatened and healthy, which would be detrimental to the environment.

### A. Humans Should Take a Hands-Off Approach to Animals

While a hands-off approach seems contradictory to the purpose of the ESA, this may be the best approach to protecting the animals. The suggestion of a hands-off approach should be taken very literally - humans should not disturb the animals. Whether they are captive or wild, they should be left alone by humans. With that being said, humans will not likely make the decision on their own to leave these animals alone. If used properly, the ESA, along with other potential regulations, can be used by administrators to mandate that humans stay away from animals.

Part of the problem of human involvement with these wild animals is that humans typically ignore animal interests when it is more

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<sup>176</sup> *Natural and Human Impacts on Wildlife*, NHPBS, <https://nhpbs.org/natureworks/nwep16b.htm> (last visited Apr. 9, 2022).

<sup>177</sup> See *infra* Part V(b).

<sup>178</sup> *Why is Biodiversity Important?*, THE ROYAL SOC'Y, <https://royalsociety.org/topics-policy/projects/biodiversity/why-is-biodiversity-important/#:~:text=Biodiversity%20is%20essential%20for%20the,also%20value%20nature%20of%20itself.> (last visited Apr. 9, 2022).



beneficial.<sup>179</sup> While society has welcomed animals into the moral community, it is not enough for officials to prioritize animals' needs over human interests.<sup>180</sup> This is evident when policymakers take landowners' interests into consideration when constructing rules.<sup>181</sup> Legislators hope that landowners will be incentivized to rehabilitate the species so that it can be down-listed, which is advantageous to the landowner because he can go back to his less stringent practices.<sup>182</sup>

While landowners may be incentivized, I fail to see how this will benefit the animals. The species population may recover thanks to the effort of the landowner, but if the landowner goes back to his old practices, the species population will slide back into decline. Therefore, considering human interests is not beneficial to the species. As soon as the species recovers and is down-listed, humans will return to the same behaviors that harmed the species in the first instances. Measures should be taken to ensure the species rehabilitates and maintains a healthy population indefinitely. Regulators should be focused on the species instead of the impact these protections will have on landowners.

Administrators should emphasize rehabilitative measures to landowners. Once a species is rehabilitated, policymakers should then encourage landowners to leave the species, and the species' habitat alone to continue to flourish. There is no point in accepting animals into the moral community if we, humans, continue to treat animals as beneath us. If our society is going to accept animals as having moral value, we must honor that commitment by showing these animals the same respect we show other humans – not interfering with their homes or their beings.

One example of a species repopulating when left alone is an elephant population in Africa.<sup>183</sup> Elephant populations in two different national parks in Africa had large populations.<sup>184</sup> Typically, this situation is handled by culling the population, but a scientist persuaded park management to let nature take its course in one of the parks.<sup>185</sup> A

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<sup>179</sup> GARY FRANCIONE, *ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION* 129, 135 (2008).

<sup>180</sup> *See id.* at 132.

<sup>181</sup> Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,757.

<sup>182</sup> *Id.*

<sup>183</sup> Anup Shah, *Why is Biodiversity Important? Who Cares?*, GLOB. ISSUES (Jan. 19, 2014), <https://www.globalissues.org/article/170/why-is-biodiversity-important-who-cares>.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

few years later, they found that the population that had been culled “remained in poor condition” while the population that was left alone naturally regenerated and balanced.<sup>186</sup> This goes to show that animals do not need humans managing and controlling species populations. Animals need humans to take a step back and let them find their own balance in nature.

### **B. Aldo Leopold’s Land Ethic Theory Tells Society to Live in Harmony with the Environment**

Nature can be thought of as an interrelated community of life that, together, acts like a living organism.<sup>187</sup> Humans are undoubtedly a part of this community of life along with other species, however, humans seem to see themselves differently.<sup>188</sup> Humans try hard to separate themselves from other species, but they are just as much a part of the nature community as any other species.<sup>189</sup> In this divide, it became clear that humans began overstepping their boundaries.<sup>190</sup> As Freyfogle writes, “[Humans] shifted from using the land to abusing it.”<sup>191</sup>

As a part of the human-centric views on land, humans thought the land was theirs to use (or abuse) however they saw fit.<sup>192</sup> Humans felt land use should be guided by economics first and foremost.<sup>193</sup> However, decisions regarding land use should not just be made with economics in mind, ethics and aesthetics should also factor into the decision-making process.<sup>194</sup> Aldo Leopold called this concept “land ethic.”<sup>195</sup> Leopold proposed that landowners could live on land and use it, but they should not use it to such an extent that its ability for “self-renewal” would be depleted.<sup>196</sup>

Although Leopold’s land ethic focuses on human interaction with the land, the principle can easily be expanded to species conservation. In fact, Leopold points out that if land was properly cared

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<sup>186</sup> *Id.*

<sup>187</sup> Freyfogle, *supra* note 110, at 10,058.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 10,058–59.

<sup>190</sup> *Id.* at 10,059.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Freyfogle, *supra* note 110, at 10,059.

<sup>194</sup> *Id.* at 10,060.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

for by its owners, nature would take over and restore the populations itself.<sup>197</sup> Nature would “do its thing” so to speak. He termed this concept as “land-health.”<sup>198</sup> “Land-health . . . is the capacity for self-renewal in the soils, waters, plants, and animals that collectively comprise the land. Health expresses the cooperation of the interdependent parts: soil, water, plants, and people. It implies collective self-renewal and collective self-maintenance.”<sup>199</sup> It is clear from this concept that humans, as discussed in the previous section, need to work in harmony with their environment, including the animals, in order for the environment to stay healthy. Chipping away at animals’ habitats is the opposite of land-health. It is important to ensure the protection of endangered and threatened species alike so that the environment may stay healthy.

Leopold proposed that a cultural revolution was necessary.<sup>200</sup> Humans needed to change the way they perceived their role in the world.<sup>201</sup> Humans needed to be ecologically informed and devoted to restoring their land.<sup>202</sup> In order to mitigate the damages humans have caused and heal the land, Leopold proposed many practices landowners can modify in order to restore the land.<sup>203</sup> Leopold did not propose that we simply stay off the land and leave it for the animals but, instead, to make it a more welcoming and comfortable environment for the animals.<sup>204</sup> “Wild plants and animals are parts of the land-mechanism, and cannot safely be dispensed with.”<sup>205</sup>

It is important to maintain species’ populations in order to ensure the environment keeps working. It will be a futile effort to maintain environmental health if humans do not take responsibility for their actions and make some changes. These changes alone cannot come from just the ESA as landowners may revert back to their old ways when restrictions are lifted. As Leopold mentioned, a cultural revolution is necessary in order to change humans’ habits to allow species to grow and “do their thing.”<sup>206</sup>

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<sup>197</sup> *Id.* at 10,062.

<sup>198</sup> *Id.* at 10,064.

<sup>199</sup> Freyfogle, *supra* note 110, at 10,064.

<sup>200</sup> *Id.* at 10,060.

<sup>201</sup> *Id.* at 10,062.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 10,065.

<sup>204</sup> *Id.*

<sup>205</sup> Freyfogle, *supra* note 110, at 10,062.

<sup>206</sup> *Id.* at 10,064.

### C. Biodiversity Is Important for the Health and Operation of the Environment

Biodiversity refers to the variety of organisms on earth.<sup>207</sup> This is important to the operation of ecosystems as each species has a role in maintaining the health of its environment.<sup>208</sup> Humans are adversely affected, just like all other species, when biodiversity decreases.<sup>209</sup>

“Species are to ecosystems what rivets are to a plane’s wing. Losing one might not be a disaster, but each loss adds to the likelihood of a serious problem.”<sup>210</sup> The services humans expect and depend on from the environment, like food and water, rely heavily on biodiversity.<sup>211</sup> Without biodiversity, ecosystems will be hindered in their ability to provide for humans in the same way.<sup>212</sup> It is, in fact, in humans’ best interest to leave animals alone in order to ensure proper functioning of ecosystems and the ultimate survival of humans. When even one species is suffering or goes extinct, the entire ecosystem suffers, including the humans and other animals living in that ecosystem.<sup>213</sup> Because each animal plays a special role in its ecosystem, losing just one species, or not having enough of that species, can prevent the ecosystem from properly functioning.<sup>214</sup>

Instead of leaving animals where they belong, humans are constantly entering their environment. Increasingly, humans put themselves in situations calling for close contact with wild animals, typically for purposes of trade or recreation.<sup>215</sup> This practice is also harmful to humans as many diseases are transmitted this way and the species will die off slowly.<sup>216</sup> Human health is harmed, biodiversity is harmed, and species’ population is harmed.

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<sup>207</sup> *The Importance of Biodiversity*, EXPLORING THE ENV’T, [http://ete.cet.edu/gcc/?/biodiversity\\_importance/](http://ete.cet.edu/gcc/?/biodiversity_importance/) (last visited Mar. 22, 2022).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Julie Shaw, *Why is Biodiversity Important?*, CONSERVATION INT’L (May 21, 2021), <https://www.conservation.org/blog/why-is-biodiversity-important>.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*; see also Shah, *supra* note 183, for more information on the resources and benefits humans receive from a biodiverse environment. The cost of replacing these would ultimately be so expensive that it makes more economic sense to conserve and rehabilitate threatened and endangered species so as to not deplete these resources. *Id.*

<sup>213</sup> Shah, *supra* note 183.

<sup>214</sup> *Id.*

<sup>215</sup> Shaw, *supra* note 210.

<sup>216</sup> *See id.*

To address concerns regarding economics, it has actually been shown that biodiversity is better for the economy.<sup>217</sup> Landowners who farm need animals, such as bees, to be able to grow their vegetables year after year.<sup>218</sup> If something were to happen to the bee population, farmers would be less successful at growing their crops due to the lack of pollinators, and they would be harmed financially.<sup>219</sup> It is, therefore, in humans' best interest to maintain protections for all species in order to ensure humans' economic success and survival.

It is important to continue protecting threatened species. If threatened species backslide into endangerment, and potentially go extinct, our environment will feel the impact. While it may not be an immediate impact, it will surely be noticed at some point.<sup>220</sup> It is important to maintain protections over species to ensure the proper functioning of the environment. This not only protects animals, but humans too.

## VI. CONCLUSION

The Endangered Species Act was enacted to help protect endangered and threatened species.<sup>221</sup> Prior to the change in interpretation of the blanket rule provision, threatened species have typically been extended the same protections as endangered species through the blanket rule.<sup>222</sup> While there is no language in the ESA that mandates this, that is how the statute was interpreted.<sup>223</sup>

Following rollbacks issued by the Trump Administration, the blanket rule was abolished in favor of species-specific rules.<sup>224</sup> However, many of these species-specific rules do not consider what is best for the species. Rather, they focus on impacts of these rules, restrictions, and protections on humans. In making the change, officials are focused on efficiency of both cost and time.<sup>225</sup>

I challenge legislators to take into consideration the interests of animals first and foremost above other concerns. While financial,

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *See id.*

<sup>221</sup> *Endangered Species Act: Overview, supra* note 1.

<sup>222</sup> *See generally* Endangered and Threatened Wildlife and Plants, 84 Fed. Reg. at 44,753.

<sup>223</sup> *Id.* at 44,754.

<sup>224</sup> *Id.* at 44,753.

<sup>225</sup> *Id.* at 44,755.

efficiency, and predictability concerns are important to ensure optimal operation for organizations like the FWS, there is no purpose if their efforts are in vain. Species need to be left alone in nature to be able to flourish as they did before human intervention. It is important for humans to learn to live in harmony with their environment instead of damaging it.<sup>226</sup> In maintaining the environment, animals will benefit and so will humans. Because humans cannot always be trusted to do the right thing, at least as society is now, it is important to maintain the vigorous protections of species issued by the ESA. These protections are what will ultimately best serve the goals of environmental security.

On June 4, 2021, the FWS announced that it will propose actions to rescind some of the rollbacks made by the Trump administration.<sup>227</sup> The Biden Administration has successfully completed two of the five intended revisions at the time of this writing.<sup>228</sup> One of the remaining rollbacks that the FWS has proposed to rescind includes the blanket rule rollback.<sup>229</sup> However, stronger protections may still be needed to protect threatened species.

Humans will eventually learn and adapt to taking care of animals through these recommended protections. They will learn how important it is to maintain species' populations for their benefit as well as the environment's benefits. Eventually, there may come a day that these safeguards are no longer necessary to ensure humans protect species, but, for now, it is important to maintain protections.

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<sup>226</sup> Freyfogle *supra* note 110, at 10,060.

<sup>227</sup> *ESA Implementation: Regulation Revisions*, U.S. FISH & WILDLIFE SERV. (June 4, 2021), [https://www.fws.gov/endangered/improving\\_esa/regulation-revisions.html](https://www.fws.gov/endangered/improving_esa/regulation-revisions.html).

<sup>228</sup> Olivia Rosane, *Biden Administration Reverses Two Trump Endangered Species Act Rollbacks*, ECOWATCH (Oct. 26, 2021, 12:31 PM), <https://www.ecowatch.com/biden-endangered-species-act-trump-2655380635.html>. The Biden Administration has rescinded the rule that would have required the FWS to “assign weight to industry’s analysis of the economic impact.” *Id.* Additionally, the Biden Administration has rescinded the rule that would have restricted the critical habitat definition to “only an area that could currently support an endangered species[,]” as opposed to areas that could become suitable for the species as well. *Id.*

<sup>229</sup> *ESA Implementation: Regulation Revisions*, *supra* note 227.