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RE-DEFINING WHAT IS FORESEEABLE:

TRUMP'S NEAR-SIGHTED INTERPRETATION OF THE ENDANGERED SPECIES ACT

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Although President Trump saw few prominent legislative accomplishments, his Administration impacted the country in ways sure to outlast his one term in office. From 2017 to 2020, the Republican controlled Senate confirmed conservative judicial appointments en masse. Meanwhile, the agencies within the Executive branch undertook considerable efforts to reshape federal regulatory policy on an array of fronts. Nowhere is this more pronounced than in the field of environmental law. The Trump appointees not only rolled back the regulatory efforts of the Obama Administration, but also went after some of the hallmark laws of the environmental movement in the United States, including the Endangered Species Act (ESA).

Measured by the metric of how many species it has preserved, the ESA is one of the most successful pieces of conservation legislation in American history. The ESA has historically held bipartisan support, but developers and the fossil fuel companies have pressed Republican lawmakers to ease some of the Act's protections.

This note will begin by providing background on the ESA and discussing the current state of the law vis-a-vi the climate crisis. From there, this note will focus on one of the Trump Administration's revisions to regulations which govern the listing of new threatened or endangered species under Section 4 of the Act. Next, this note will discuss, in the event that the rule change is upheld, the potential implications regarding the future listing of species whose primary threat is climate change. Lastly, this note will explore the legal arguments against the rule change, specifically that it does not warrant deference under the Chevron Doctrine.

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I. Introduction

Passed by the 93rd Congress and signed into law by President Richard Nixon, the Endangered Species Act of 1973 (ESA) has been called "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[1] The ESA[2] is credited with stabilizing and rebuilding the populations of many species of plants and animals that were once on the brink of extinction. The U.S. Fish and Wildlife Services (FWS) maintains the most appropriate criteria to use in measuring the success of the ESA "includes the number of species that are no longer declining, have stable populations, or have gained a solid foothold on the path toward recovery and are improving in status."[3] On the basis of this criteria, in July 2013, the FWS estimated 98 percent of species listed have survived, signifying the success of ESA.[4]

Notably, the ESA is credited with saving numerous marine and terrestrial species including the grizzly bear, the Florida manatee, the California condor, and the Nation's most iconic wildlife species, the American Bald Eagle.[5] In total, scientists estimate a minimum of 227 species were saved from extinction under the ESA's protection, with over 1,600 species in the United States still being protected and recovering.[6]

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[1] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).
[2] Endangered Species Act of 1973, 16 U.S.C. § 1531 *et. seq.*
[3] Defining Success Under the Endangered Species Act, U.S. Fish & Wildlife Service (2013), https://www.fws.gov/Endangered/news/episodes/bu-04-2013/coverstory/index.html.
[4] *Id.*
[5] Salvador Rizzo, *Has the Endangered Species Act Saved 'Very Few' Plants and Animals?*, WASH. POST (Aug. 16, 2019), https://www.washingtonpost.com/politics/2019/08/16/has-endangered-species-act-saved-very-few-plants-animals.
[6] Noah Greenwald, et al., *Extinction and the U.S. Endangered Species Act*, 7 PEERJ 6803, 6804 (Apr. 22, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6482936/.

The ESA was enacted on the wings of broad bipartisan support, passing the Senate unanimously and receiving only four nay votes in the House.[7] The Act maintains popularity among members of the general public, regardless of political affiliation.[8] Inside the beltway is another story. Following a decades-long lobbying effort by industries such as the oil and gas, mining, and agribusiness, a significant portion of the GOP caucus in Congress is prepared to support significant rollbacks of the ESA.[9] On the contrary, with climate change posing *the* existential threat to all species, proponents of the ESA see the Act is more important now than ever.[10]

In May 2019, the United Nations' Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (ISPBES) released a devastating report which found that one million species of plant and wildlife are now threatened worldwide and in danger of becoming extinct.[11] The ISPBES ranked climate change among the top three drivers behind the extinction crisis.[12] Two months later, in the midst of the hottest July on record,[13] the Department of Interior (DOI), FWS, National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), and the Department of Commerce (collectively "the Agencies") announced a proposed rule change which would revise the regulations for listing species and designating critical habitat under Section 4 of the Act, 16 U.S.C. § 1533.[14]

The proposed rule change was seen by many as another instance of the Trump administration putting the needs of energy companies before the environment. Without delving into every constituent part of the rule change, this note will focus on two components of the aforementioned regulation which could impact the future of the listing process and reduce the degree to which species listed as threatened under the Act are protected. First, this note will review the rules new interpretation of the phrase foreseeable future language which is found in the definition of a threatened species."[15] Second, this note will address the Trump administration's other change which removes the "blanket 4(d) rule."[16] Third, this note will review case law from before the rule change. This will be instructive in illustrating: (1) the stark contrast between the

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[7] 119 Cong. Rec. 25,676, 42,910-16 (1973).

[8] Ralph Maughan, *Endangered Species Threatened by Unneeded Energy*, ASSOCIATED PRESS (Aug. 6, 2017), https://apnews.com/6dabba08558b4cd6b7a323c055b97d7b.

[9] Kurtis Alexander, *Trump Weakens Endangered Species Act; California Promises to Put up a Fight*, S.F. CHRON. (Aug. 12, 2019), https://www.sfchronicle.com/news/article/Trump-weakens-Endangered-Species-Act-California-14299009.php.

[10] James Ming Chen, *Protecting Biodiversity Against the Effects of Climate Change Through the Endangered Species Act*, 47 WASH. U. J.L. & POL'Y 11, 22 (2015).

[11] United Nations, *UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating,* 'UNITED NATIONS: BLOG (May 6, 2019), https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/; *See also* James Jay Tutchton, *Getting Species on Board the Ark One Lawsuit at a Time: How the Failure to List Deserving Species Has Undercut the Effectiveness of the Endangered Species Act*, 20 ANIMAL L. 401, 404 (2014) (discussing the view of some scientists that we are entering are in the midst of the next great extinction crisis).

[12] *Id.*

[13] Henry Fountain, *NOAA Data Confirms July Was Hottest Month Ever Recorded*, N.Y. TIMES (Aug. 15, 2019), https://www.nytimes.com/2019/08/15/climate/hottest-july-noaa.html.

[14] Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg., 35193-01 (proposed July 25, 2018) (codified in 50 C.F.R. § 424.11).

[15] 16 U.S.C. § 1532.

[16] The blanket 4(d) rule was promulgated by the FWS in 1975 pursuant to the discretion granted to the Service in Section 4 of the ESA. Ya-Wei Li, Section 4(D) Rules: The Peril and the Promise, Defenders of Wildlife ESA Policy White Paper Series 3 (2017), https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf.

policies of the Obama administration and that of the Trump administration and (2) the level of deference courts are willing to grant executive agencies when they attempt to interpret congressional statutes.

Despite the judicially-deferential standard employed by courts post-*Chevron*, there is a real question as to whether or not the rule change is vulnerable to legal challenge. This note is a roadmap for the arguments that might be used to oppose the rollback.[17] While the rollback is supported by doctrines providing deference to administrative agency interpretations of statutes, the arguments opposing the rollback cite to case law demonstrating a reduction in the strength of *Chevron* deference, which is supported by the rationale for the Administrative Procedures Act (APA). This note will argue that, without *Chevron* deference, the Trump administration's interpretations of the ESA are vulnerable to legal challenge because there is a legitimate question as to whether the language at issue in the ESA presents an ambiguity. Furthermore, if such ambiguity exists an additional question arises; whether the Trump administration's interpretation runs afoul of the Act's purpose, as enunciated in the extensive legislative history.

Finally, as an ideological shift is happening on the U.S. Supreme Court, it is worth examining whether *Chevron* is as strong as once thought. This note will examine some of the recent decisions of the Supreme Court which suggest that the doctrine of *Chevron* has been weakened. This is relevant because the weaker the doctrine becomes, the more plausible it is that those attempting to challenge this rule change might emerge successful.

II. Endangered Species Act of 1973

A. Background, Context, & Purpose of the Act

A wave of environmental consciousness swept across the U.S. in the late 1960s and early 1970s, pressuring Congress to enact several new federal statutes aimed at improving environmental quality.[18] The ESA was one such statute. The ESA was the third attempt to tackle the problem of species loss. The Endangered Species Preservation Act of 1966[19] only provided for listing native animal (not plant) species that were in danger of becoming extinct and provided limited protection. The Endangered Species Conservation Act of 1969[20] provided additional protection to species that were in danger of worldwide extinction by prohibiting importation and the sale of these animals. However, with passage of time it became apparent that these laws were not flexible enough to address the changing needs of the animals themselves and their habitat.[21] On the heels of the ratification of the Convention on International Trade in Endangered Species of

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[17] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). *Chevron* promotes deference to agencies because they are more politically accountable and have relative expertise that courts do not. This note is not taking the position that *Chevron* is flawed. Rather, it is analyzing whether this rule change deserves deference under *Chevron*. This analysis comes at a time when the Court's conservative majority continues to signal its willingness to re-examine, if not completely overhaul, the doctrine. *See* Bradley Lipton, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L. J. 2096 (2010).

[18] Kevin D. Hill, *The Endangered Species Act: What Do We Mean by Species?*, 20 BOS. C. ENVTL. AFF. L. REV. 239, 240 (1993), http://lawdigitalcommons.bc.edu/ealr/vol20/iss2/3.

[19] Pub. L. No. 89-669, 80 Stat. 926 (1966).

[20] Pub. L. No. 91-135, § 5, 83 Stat. 278 (1969).

[21] 119 Cong. Rec. 30, 162 (1973).

Wild Fauna and Flora (CITES)[22] treaty—an international, multilateral agreement to protect endangered species—Congress took steps to bolster the protection to species under U.S. law.[23]

B. The U.S. Moves to "the Forefront" in the Fight to Prevent Species Loss

The ESA was passed during a time when man was becoming more aware of the astonishing complexity of the natural environment.[24] The legislative history illustrates how ESA was passed as a result of Congress's growing concern over the rapid deterioration of some plants and animals, as well as a major increase of the species who were being threatened with extinction.[25] It was estimated at the time that at least 20 species per decade were becoming extinct in the U.S., with an even larger number threatened. Extrapolating these numbers worldwide would result in an approximately 300 extinctions per decade.[26] Congress's primary purpose in passing the ESA in 1973 was to prevent plant and animal species from becoming extinct due to human influence on their ecosystem and to restore threatened species as viable parts of the ecosystem.[27]

The version of the ESA which passed in 1973 was a more comprehensive and responsive statute—including all plants, vertebrates, and invertebrates, as well as adding the "threatened" category and defining the term "threatened" in a way the drafters of the ESA intended to prevent the population of a species from becoming severely depleted and at risk of extinction.[28] The foresight of Congress in adding the "threatened" category provided a means to avoid repairing damages after they have occurred and preventing future crises .[29]

Over its 46-year history, the ESA has proven extraordinarily effective when its protections are employed. An estimated 99 percent of the species listed under the Act are still in existence today.[30] The full extent of the benefits received cannot be fully quantified given our knowledge of ecosystem services. What utility to humans may have been lost and what consequences on the broader ecosystem might have occurred had the estimated 227 species[31] saved by the Act gone extinct?[32]

Currently many species on the brink of extinction are seemingly insignificant, such as the freshwater mussels. Lacking the charisma of a grizzly bear or bald eagle, conversation efforts for these species struggle. Yet these freshwater mussels provide many important functions in aquatic

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[22] The Convention on International Trade in Endangered Species of Wild Fauna and Flora **(**CITES) is the only treaty to ensure that international trade in plants and animals does not threaten their survival in the wild. A State or country that has agreed to implement the Convention is called a Party to CITES. Currently there are 183 Parties. The U.S. formally joined in March of 1973. *What is CITES?,* U.S. FISH & WILDLIFE SERV., https://www.fws.gov/international/cites/what-is-cites.html (last visited Feb. 29, 2020).

[23] 119 Cong. Rec. 30, 162 (1973).

[24] Aldo Leopold, *The Round River*, A Sand County Almanac 190 (1970).

[25] 119 Cong. Rec. 30, 167 (1973).

[26] *Id.*

[27] *Id.*

[28] 119 Cong. Rec. 922 (Jan. 11, 1973) (statement of Rep. Dingell reprinted in the Legislative History).

[29] 119 Cong. Rec. 30, 167 (Sept. 18, 1973) (statement by Rep. Gilman on the purpose of the Endangered Species Act of 1973).

[30] U.S. Fish & Wildlife Serv., *Endangered Species Recovery Program* (June 2011), http://www.fws .gov/endangered/esa-library/pdf/recovery.pdf.

[31] J. MICHAEL SCOTT ET AL., BY THE NUMBERS, IN THE ENDANGERED SPECIES ACT AT THIRTY, VOLUME 1: RENEWING THE CONSERVATION PROCESS 16, 31 (Dale D. Goble et al., eds., Is. Press 2006).

[32] "The outstanding scientific discovery of the twentieth century is not television, or radio, but rather the complexity of the land organism. Only those who know the most about it can appreciate how little is known about it. The last word in ignorance is the man who says of an animal or plant: 'What good is it?'" Leopold, *supra* note 24.

ecosystems.[33] While this species may seem to be a trivial species, the freshwater mussels provide many key functions beneficial to humans like water purification.[34] Because of the large regression in the freshwater mussel population, these mussel-provided ecosystem services that are beneficial to humans are declining rapidly.[35]

Shortcomings of the ESA generally result from a failure to list threatened or endangered species in a timely fashion.[36] FWS claims its failure to do so stems from budgetary restrictions placed on them by the Congress. However, a report done by the Inspector General revealed that "the Services does not actually record and track actual employee time by program sub-activities," and as a result the DOI cannot acquire the actual data on how much is spent on listing.[37] Arguably, a more compelling explanation is that politics and special interests often weigh on the decisions made by FWS in the listing process when they should not.[38] Yet the public's opinion of the Act has remained high, with roughly four out of five Americans expressing approval for the Act and only one in ten believing it should be repealed.[39]

III. Understanding Section 4

Section 4 of the ESA deals with species and critical habitat designation. Under Section 4 of the ESA, if any species existence is jeopardized by any of the five factors listed in Section 4(a)(1) it will be deemed appropriate for listing as either threatened or endangered. The five factors are: (1) the present or threatened destruction, modification, or curtailment of the species habitat or range; (2) over-utilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) "other natural or manmade factors affecting its continued existence."[40] Though climate change is not enunciated as one of the five factors, climate data fits squarely within ESA listing factor (A), "present or threatened destruction, modification, or curtailment of [a species'] habitat or range," and (E), "other natural or manmade factors affecting its continued existence."[41] Importantly, the statute mandates that listing determinations are to be made "solely on the basis of the best scientific and commercial data available . . . ."[42]

Section 4 allows for the listing of both endangered and threatened species for protections.[43] The ESA defines an endangered species as any species with the exception of some species of

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[33] Eric Biber, *The Application of the Endangered Species Act to the Protection of the Freshwater Mussels: A Case Study*, 32 ENVTL. L. 91 (2002).
[34] *Id.*
[35] *Id.*
[36] Tutchton, *supra* note 11, at 411–12.
[37] Memorandum from Harold Bloom, Assistant Inspector Gen. for Audits, Dept. of Int., to Assistant Sec'y Fish & Wildlife & Parks, *Final Audit Report on the Endangered Species Program, U.S. Fish and Wildlife Service (No. 90-98)* (Sept. 27, 1990) (copy on file with *Animal Law*); U.S. Dep't. of the Int., Off. of Inspector Gen., *Audit Report: The Endangered Species Program* Rpt. No. 90-98, 7 (Sept. 1990).
[38] *See* Western Watersheds Project v. Foss, 2005 U.S. Dist. Lexis 45753 (D. Idaho Aug. 19, 2005).
[39] Misti Crane, *Vast Majority of Americans Support Endangered Species Act Despite Increasing Efforts to Curtail It*, OHIO ST. UNIV. (July 19, 2018), https://www.sciencedaily.com/releases/2018/07/180719121800.htm.
[40] 16 U.S.C. § 1533(a)(1).
[41] Claire M. Horan, Case Comment, *Defenders of Wildlife v. Jewel (D. Montana 2016)l*, 41 HARV. ENVTL L. REV. 297, 302 (2017). *See also* WildEarth Guardians v. Salazar, 741 F.Supp.2d 89, 102 (D.D.C. 2010) (failure to consider both the individual and cumulative effects of all listing factors renders a finding by the Agencies arbitrary and capricious).
[42] 16 U.S.C. § 1533(b)(1)(A).
[43] § 1533(d).

insects , which is in danger of extinction through all or a significant portion of its range.[44] Meanwhile, a threatened species is "any species which is likely to become an endangered species within the *foreseeable future*."[45] The ESA provides two mechanisms for considering species for listing as endangered or threatened.[46] First, the Secretary of the Interior may on their own initiative identify species for listing under the standards of section 4(a)(1).[47] Second, the so- called citizen suit provision of the ESA allows for interested persons to compel the Secretary's consideration of a species for protection by filing a petition for listing.[48]

The statute specifies a time limit within which a decision must be made, and the Agencies are required to justify the action they take. If the Secretary determines the petition to list or delist a species is not warranted, it will be subject to judicial review. Any negative findings by the Secretary under subparagraph A and subparagraph B(i) and B(iii) will be subject to judicial review.[49] Within 90 days after receiving a petition to add or remove from either list, the Secretary shall determine if the petition has substantial scientific or commercial information that indicates the action petitioned for is warranted.[50] Upon determination that such information is present, the Secretary shall promptly commence a review of the concerned species and publish the findings in the Federal Register.[51]

Every time a species is listed as threatened the Agencies have the power to issue regulations as they deem necessary to provide for the conservation of said species.[52] In 1975, FWS issued a "general" 4(d) rule. The 4(d) rule, also known as the blanket rule, furthers the purpose of the ESA which is to above all prevent a species from declining to the point that extinction is inevitable.[53] This afforded all ESA protections for endangered species to any new species listed as threatened. However, even with the blanket rule, FWS retained discretion to issue "special 4(d) rules" in which a threatened species receives less protection than a species listed as endangered would.[54]
The rule change rescinds the blanket rule so that future species listed as threatened will receive "species-specific" protections.[55] This leaves uncertainty over what the Act can do for species likely to become endangered in the foreseeable future—especially those in danger of habitat loss due to climate change.[56] Now, the new regulations have removed this long standing practice and no longer will provide the same standard of protections to those species listed as "threatened."[57]

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[44] § 1532(6).
[45] § 1532(20) (emphasis added).
[46] 89 Am. Jur. Proof of Facts 3d 125 (Feb. 15, 2020).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] 16 U.S.C. § 1533(3)(A).
[51] *Id.*
[52] § 1533(d).
[53] Li, *supra* note 16, at 4.
[54] *Id.*
[55] *See* 50 C.F.R. § 424.11.
[56] Maughan, *supra* note 8.
[57] Endangered and Threatened Wildlife and Plants ; Revision of the Regulations for Listing Species and Designating Critical Habitat, Fed. Reg., 35193-01 (July 25, 2018) (codified in 50 CFR § 424.11).

IV. The Current State of Listing

A. Climate Change and the Increase in Petitions for Listing

During the first term of the Obama Administration, officials at the FWS sounded the alarm that an avalanche of petitions for listing of species as threatened or endangered had created a backlog.[58] The Obama-era FWS was not implying these petitions were in any way frivolous. Rather, they were acknowledging that if the then-present trends of habitat and species loss continued, the number of petitions might inundate the federal government, impairing their ability to act in a timely manner to protect imperiled plants and wildlife. FWS currently faces a backlog of more than 500 species that have been determined to potentially warrant protection, but which nevertheless await a formal listing.[59]

Every report about climate and species loss has shown things are worse than they were 12 years ago, reinforcing that the need to act has only become more dire.[60] Consequently, environmental advocacy groups like the Center for Biological Diversity and Wild Earth Guardians have begun to increase their efforts to petition species under the citizen-suit provision.[61] The petitions filed to list or delist species has grown exponentially over the last few decades.[62] As the FWS becomes overwhelmed with the number of petitions, they have fallen dramatically behind in their obligation to make determinations within the Section 4 deadlines.[63] This has led to numerous Section 4 deadline suits filed against both FWS and National Marine Fisheries Service (NMFS), with the majority filed against the FWS. Between 2005 and 2017, the Government Accountability Office (GAO) reported 141 suits were filed involving 1,441 species. The majority of the deadline suits were settled however, because there was no dispute that the agencies had missed the deadlines.[64]

As species' protections risk fraying, the incoming stream of new additions to the ESA has somewhat slowed down. The Trump administration's first 22 months saw the fewest number of species listed over the same period since the Reagan administration.[65] Just 15 species were added to the list, compared with 56 under the Obama administration, 22 under George W. Bush, and 70 under George H.W. Bush, according to the Center for Biological Diversity.[66]

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[58] Jonathan Wood, *Modernization of the Endangered Species Act*, PERC (Sept. 26, 2018) https://www.perc.org/2018/09/26/modernization-of-the-endangered-species-act/.
[59] U.S. FISH & WILDLIFE SERV., NATIONAL LISTING WORKPLAN FOR MAY 2019, https://www.fws.gov/endangered/esa-library/pdf/5-Year%20Listing%20Workplan%20May%20Version.pdf (last visited Feb. 29, 2020).
[60] United Nations, *supra* note 8.
[61] Wood, *supra* note 58.
[62] *Id.*
[63] U.S. Fish & Wildlife Serv., *supra* note 59.
[64] U.S. Gov't Accountability Office, GAO-17-304, Information on Endangered Species Act Deadline Suits (2017).
[65] Stephen Lee, *Endangered Species Listings Sharply Down Under Trump*, BLOOMBERG ENVIRONMENT (Nov. 30, 2018) https://news.bloombergenvironment.com/environment-and-energy/endangered-species-listings-sharply-down-under-trump.
[66] *Id.*

V. Why Section 4's Foreseeable Future Language Matters

As stated previously, a threatened species is one that is likely to become an endangered species within the foreseeable future.[67] The term "foreseeable future" is not defined within the Act.[68] While the legislative history of the ESA is extensive, lawmakers never parsed the clause "likely to become endangered within the foreseeable future."[69] Absence of an expressed definition has given rise to the present debate over whether or not the term foreseeable future is an ambiguity open to agency interpretation. The addition of the "threatened" category was intended to take the necessary steps to prevent species from reaching the "endangered" level.[70] Inserting the threatened category into the ESA was considered a vital part of the bill because it provided a means to prevent a species from reaching a crisis situation.[71] It is arguably foreseeable that many species will face extinction from the effects of climate change. This is particularly as a result from a loss of habitat due to climate change—making it now even more critical that these species faced with survival from these effects are protected.

VI. The Rule Change

A. Trump's Deregulation Campaign at the Department of the Interior

In the early days of his Presidency, Trump signed Executive Order 13777, enforcing his "regulatory reform agenda."[72] Pursuant to this order, on July 25, 2018, the Department of the Interior, Fish and Wildlife Service, Department of Commerce and the National Atmospheric Administration (collectively "the Agencies") announced the proposed rule change.[73]

This proposed rule change in particular was anticipated given the current make-up of the DOI.[74] Following the scandal-plagued tenure of former Secretary Ryan Zinke, Deputy Secretary David Bernhardt was nominated to head the Department of the Interior.[75] Bernhardt had previously served as Solicitor to the DOI under President George W. Bush.[76] During Barack Obama's presidency, Bernhardt had lobbied for such changes on behalf of the oil and gas industry, spearheading a campaign to narrow the scope of the ESA.[77] Hence, the debate surrounding Bernhardt's nomination process was contentious.[78] During the debate over Mr. Bernhardt's

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[67] *See* 16 U.S.C. § 1532(20).
[68] *Id.*
[69] U.S. DEP'T. OF INTERIOR, M-OPINION ON THE MEANING OF "FORESEEABLE FUTURE" IN SECTION 3(20) OF THE ENDANGERED SPECIES ACT 10, 11 (Jan. 16, 2009).
[70] 119 Cong. Rec. 25693 (1973).
[71] 119 Cong. Rec. 25668 (1973).
[72] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).
[73] Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193-01 (July 25, 2018) (codified at 50 C.F.R. § 242.11).
[74] *Id.*
[75] Grace Hauck, *Who is David Bernhardt, the New Deputy Interior Secretary*, CNN (July 25, 2017), https://www.cnn.com/2017/07/24/politics/david-bernhardt-confirmed-deputy-secretary-interior-department/index.html.
[76] *Id.*
[77] Grace Segers, *Washington's New Monument: David Bernhardt*, CBS NEWS (Sept. 20, 2019), https://www.cbsnews.com/news/interior-secretary-david-bernhardt-a-former-lobbyist-talks-about-trumps-promise-to-drain-the-swamp.
[78] 165 Cong. Rec. 2397 (Apr. 10, 2019).

confirmation to become the next Secretary of the Department of Interior, Democratic Senator Mazie Hirono, of the Committee on Energy and Natural Resources pointed to a recent report in which executives from the Independent Petroleum Association of America were caught bragging on tape about the unprecedented access Bernhardt had granted them in his capacity as Deputy of the Department of Interior. Despite concerns he was too conflicted to head the Department, Bernhardt was ultimately confirmed.[79] Upon his confirmation, Secretary Bernhardt was in position to enact a change that he had first suggested as Solicitor.

While serving as Solicitor under George W. Bush, Bernhardt authored several controversial memorandum opinions, or M-Opinions. In 2009, then-Solicitor Bernhardt opined about the "speculative nature" of interpreting foreseeable future to include events that were not "reliable." He then advocated for broader discretion to be granted to the Agencies in concluding whether or not threats to a species were "within the foreseeable future."[80] The case law interpreting this portion of the ESA was at the time, minimal.[81] Therefore, in arguing that the phrase foreseeable future should be re-examined, Bernhardt honed in on the omission of any definition for the phrase foreseeable future in the Act and the absence of discussion of the phrase in the legislative history of the ESA.[82] To Bernhardt, this omission denotes a Congressional intent to defer to agencies, granting the Secretary of DOI broad discretion in determining what qualifies as "foreseeable future."[83] By qualifying what is foreseeable, Bernhardt was essentially advocating for raising the evidentiary bar for listing threatened species and his justification for doing so was grounded in *Chevron* and its progeny.[84]

B. The Rule Change is Implemented

Effective September 26, 2019, the rule change became official and the criteria for "foreseeable future" was defined:

> The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. The Services [USFWS and NMFS] will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability.[85]

The Trump administration attempted to redefine the term "foreseeable future" as it pertains to listing threatened species.[86] Under the revised rule, foreseeable future will extend only so far into the future as the Services can reasonably determine that conditions potentially posing a danger

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[79] *Id.* at 2398.
[80] U.S. DEP'T. OF INTERIOR, supra note 69, at 14–16.
[81] *Id.*
[82] *Id.* at 3.
[83] *Id.* at 16.
[84] *Id.* at 8.
[85] 50 C.F.R. § 424.11(d).
[86] Brian Resnick, *The Endangered Species Act is Incredibly Popular and Effective. Trump is Weakening it Anyway*, VOX (Aug. 12, 2019), https://www.vox.com/science-and-health/2019/8/12/20802132/endangered-species-act-trump-weakening.

of extinction in the foreseeable future are likely.[87] Using the argument that foreseeable future is not clearly defined in the Act, the Agency asserts they have the authority to define the term, and not the courts.[88] While the rule change will not necessarily change the letter of law, it will likely have an effect on the spirit of the law. Another key component of the changes proposed by Secretary Bernhardt is the consideration of factors like life-history characteristics, threat-projection timeframes, and environmental variability when determining whether to list a species. All of these factors could potentially be grounds for dismissing threats to species petitioned for listing.[89]

The backlash from environmental groups and state Attorney's General has been swift. In August of 2019, a collection of advocacy organizations filed suit in federal court seeking an injunction to stop the rule change.[90] The suit, brought pursuant the ESA's citizen-suit provision[91] alleges an injury in the form of loss of opportunity to study and enjoy the wildlife put at risk by the rule change. This likely does not constitute an injury in fact, which is required to demonstrate standing in federal court under Article III.[92] Additionally, California Attorney General Xavier Becerra, joined by 16 other attorneys general, filed suit against the Agencies claiming the rule change was in violation of the Administrative Procedures Act's arbitrary and capricious standard. Whether or not these cases proceed, it is inevitable that the rule change will be subject to much litigation as soon as petitions for listing are denied by the Agencies operating pursuant to it.

At the time Bernhardt authored the aforementioned M-Opinion, only two courts had ruled on cases in which the parties dispute what constituted "in the foreseeable future" in the context of the ESA.[93] In *Oregon Natural Resources Council v. Daley*,[94] the plaintiffs (a group of environmental organizations) challenged the NMFS's decision not to list the coho salmon as a threatened or endangered species under the ESA.[95] The decision not to list the coho was primarily made on the assumption that the recently adopted Oregon Coastal Salmon Restoration Initiative (OCSRI) would reverse the decline of the species.[96] The court ultimately ruled that this wait-and-see stance to wildlife preservation ran afoul of the ESA.[97]

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[87] *Id.*
[88] *Id.*
[89] LINDA TSANG, THE ENDANGERED SPECIES ACT AND CLIMATE CHANGE: SELECTED LEGAL ISSUES, CONG. RSCH. SERV. at 4 (Sept. 20, 2019), https://www.everycrsreport.com/files/20190920_R45926_4d410e7e9baf8ac44ff000f783a8cb1d56a81b22.pdf.
[90] Center for Biological Diversity v. Bernhardt, No. 3:19-cv-05206 (N.D. Cal. filed Aug. 21, 2019).
[91] When a citizen-suit is brought by an entity or organization standing is under Article III, so long as the other constitutional requirements of standing are met. *See* Bennet v. Spear, 520 U.S. 194 (1997).
[92] Under the precedent of *Lujan v. Defenders of Wildlife* there is a real possibility that the plaintiff's suit will be dismissed for a lack of standing. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
[93] *See* Or. Nat. Res. Council v. Daley, 6 F. Supp. 2d 1139 (D.Or. 1998); Western Watersheds Project v. Foss, 2005 U.S. Dist. Lexis 45753 (D. Idaho Aug. 19, 2005).
[94] Sec. Bernhardt cites *Oregon Natural Resource Council v. Daley* in his memorandum opinion for the proposition that the phrase "in the foreseeable future" lacks a clear interpretation. U.S. Dep't. of Interior, M-Opinion on The Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act at 9-11 (Jan. 16, 2009). In doing so, he completely ignores that one of the tenants of the 1973 Act was to err on the side of caution when determining whether or not a species should be protected.
[95] Or. Nat. Res. Council v. Daley, 6 F. Supp. 2d 1139, 1144-1145 (D.Or. 1998) (discussing how a group of 16 scientists noted a drastic decline in the coho population and reported the species "is likely to become endangered in the foreseeable future.").
[96] *Id.* at 1142.
[97] *Id.* at 1152.

In *Western Watershed Project v. Foss*, FWS indicated the listing of the slickspot peppergrass may be appropriate, however, data was insufficient at that time.[98] In 1999, the slickspot peppergrass was reinstated as a candidate species and FWS prepared a listing package concluding that "based on our evaluation, the preferred action is to list."[99] After facing political pressure, FWS issued a withdrawal of the proposed rule to list.[100] The court held the "FWS violated the ESA by requiring a high risk of extinction" before deciding to list the slickspot peppergrass" finding FWS decision was arbitrary and capricious.[101]

At first glance, one might surmise that if *Western Watersheds Project* were brought before a court today, that the 64 percent figure would meet the new standard of likely as the Agencies purport it to be—by way of exceeding a simple majority (greater than 50 percent chance of occurrence).[102] However, such a conclusion would be to disregard other language added as part of the rule change which could prove troublesome. The caveats that the Agencies will also take into account are, "considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability," complicate the analysis to a point where one cannot be sure of what sorts of threats to animal and plant life, in the abstract, are sufficient for listing a species.[103]

VII. Do the Threats Posed by Climate Change Fit Within This New Definition of What is Foreseeable?

Federal courts have shown a willingness to accept climate data as a sufficient basis for listing a species as threatened or endangered.[104] Two such cases were *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litig*ation (*In re Polar Bear*) and *Alaska Oil and Gas Association v. Pritzker*. An overview of these cases is instructive because they show how the Agencies were interpreting the foreseeable future language during the years prior to the start of the Trump administration. Similarly, these cases show the level of deference circuit courts are willing to give the Agencies in making listing assessments.

A. Case law Pre-Rule Change: *In re Polar Bear* & *Pritzker*

In *In re Polar Bear*, the D.C. Circuit upheld FWS's decision to list the Polar Bear as a "threatened" species under the ESA as a result of climate change, holding that the FWS engaged in reasonable decision-making and adequately explained the scientific basis for its decision.[105]

The Appellant argued that the foreseeable future is the furthest period of time "in which [FWS] can reliably assess, based on predicted conditions whether . . . the species likely will

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[98] *Foss*, 2005 U.S. Dist. Lexis 45753.
[99] *Id.* at *13.
[100] *Id.* at *2.
[101] *Id.* at *52.
[102] *Id.* at *44.
[103] *See* 50 C.F.R. § 242.11.
[104] In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litig., 709 F.3d 1 (D.C. Cir. 2013), *cert. denied*, Safari Club Intern. v. Jewell, 571 U.S. 887 (2013). *See also* Alaska Oil and Gas Ass'n v. Pritzker, 840 F.3d 671 (9th Cir. 2016).
[105] *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, Columbia Univ. Climate Case Chart, http://climatecasechart.com/case/in-re-polar-bear-endangered-species-act-listing-and-§-4d-rule-litigation/ (last visited Feb. 29, 2020). *See also In re Polar Bear*, 709 F.3d at 9.

become endangered" and a climate model projecting 45 years into the future exceeded what should be acceptable. The court rejected this argument, stating that when FWS relied on climate models to determine whether the species would be threatened in the foreseeable future it was not relying on factors which Congress had not intended it to consider, nor was their explanation for their decision "so implausible that it could not be ascribed to a difference in view, or the product of agency expertise."[106]

In *Alaska Oil and Gas v. Pritzker*, the oil and gas association, along with the state of Alaska challenged the NMFS's decision to list the Pacific bearded seal subspecies to the endangered species list.[107] The NMFS used the International Panel on Climate Change (IPCC) climate models to determine the magnitude climate change will have on sea ice.[108] Plaintiffs next asserted the longer-term climate projections used by NMFS to predict the effect loss of sea ice would have on the Pacific bearded seal extended beyond the previous practice of setting 2050 as the foreseeable future boundary.[109] NMFS argued the agency may determine the timeframe for the foreseeable future, based on the best data available for a particular species and its habitat.[110] Plaintiffs also argued the NMFS was required to show the impact of climate change on the Pacific bearded seal "will be of a magnitude that places the species 'in danger of extinction' by the year 2100."[111]

In the words of the court, "the ESA does not require an agency to quantify population losses, the magnitude of risk, or a projected 'extinction date' or 'extinction threshold' to determine whether a species is 'more likely than not' to become endangered in the foreseeable future."[112] This misinterprets the ESA's requirement that an agency demonstrates a species will "likely become an endangered species within the foreseeable future" before the species can be listed.[113] The Ninth Circuit ruled the NMFS did not misinterpret or misapply the word "likely" when it concluded the bearded seal was "likely" to become an endangered species within the foreseeable future.[114] The NMFS conducted a thorough assessment and relied on the best available scientific and commercial data in making its determination.[115] Therefore, the court determined the NMFS's decision to list the Pacific bearded seal was not arbitrary or capricious and was supported by substantial evidence.[116]

The D.C. Circuit held the ESA merely requires the NMFS to consider the best and most reliable scientific and commercial data when determining if a species is likely to become endangered in the foreseeable future, and identify the limits of the data, rather than requiring the agency to make a listing decision based on ironclad evidence.[117] Additionally, the court said uncertainty of the speed and impact of an adverse impact on a species does not invalidate the data supporting the conclusion that loss of habitat at key life stages will likely jeopardize the bearded seal's survival over the next 85 years.[118] The NMFS did not misinterpret or misapply the word

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[106] *In re Polar Bear*, 709 F.3d at 186.
[107] *Pritzker*, 840 F.3d at 671.
[108] *Id.* at 676–77.
[109] *Id.* at 675. *See also* Shawna Riley, *Alaska Oil Gas Association v. Pritzker: The Court Foresees a Warm Future and Upholds Bearded Seals' ESA Listing*, 29 VILL. ENVTL. L. J. 309 (2018).
[110] *Pritzker*, 840 F.3d. at 681.
[111] *Id.* at 684.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 684.
[116] *Id.*
[117] *Id.* at 680.
[118] *Id.*

"likely" when it concluded the bearded seal was "likely" to become an endangered species within the foreseeable future.[119]

B. Implications of the Rule Change

From the standpoint of an environmentalist, the outcome in both *In re Polar Bear* and *Pritzker* are encouraging. Under the rule change, the outcome in either case might be different. The change calls for the consideration of "threat projection time" and "environmental variability."[120] In *Pritzker*, the volatility of climate projections did not diminish the value of those projections. The rule change would now require listing decisions to take into account environmental variability in determining what is foreseeable.

Prior to the rule change, some lower courts had held that projections of the effects from climate change, are not sufficiently foreseeable to warrant the listing.[121] Placing limitations on the foreseeability analysis could lead to outcomes manifestly contrary to the legislative intent of the ESA.[122] It is the concern of some that a judge following the letter of the rule change might deny what would otherwise be credible listing petitions pursuant to this rule change. In regards to the Administration's decision to rescind the "blanket rule," it is nearly impossible to see how lessening the protections offered to threatened species will produce better outcomes.

VIII. The *Chevron* Doctrine

A. Understanding the *Chevron* Doctrine

The rule change gives the Agencies new reasons to deny petitions for listing. When these denials are challenged in federal court, the Agencies can argue *Chevron* requires the courts defer to their interpretation of the ESA's foreseeable future language. The Doctrine of *Chevron* is prompted when an executive agency interprets a perceived ambiguity in a Congressional statute. Because this rule change involves the Agency's interpretation of statutory language, the *Chevron* Doctrine is implicated. If the rule did not receive deference under the *Chevron* Doctrine and was found to be arbitrary or capricious, the rule change would be unlawful.

Following the landmark U.S. Supreme Court case, *Chevron v. Natural Resource Defense* Council, a paradigm-shift in U.S. administrative law occurred. In his opinion, Justice Stevens laid out the two-part test for determining when judicial deference to the interpretation of federal statutes by administrative agencies is proper.[123] Firstly, the Court should inquire into whether Congress directly spoke on the issue at hand. If Congress was silent or addressed the issue ambiguously, then the second step asks whether an agency's interpretation of the statute is reasonable.[124] A reasonable interpretation need not be the most reasonable interpretation to be permissible under the standard set forth in *Chevron*.[125]

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[119] *Id.*
[120] *See* 50 C.F.R. § 424.11(d).
[121] *See* Center for Biological Diversity v. Lubchenco, 785 F. Supp. 2d 945 (N.D. Cal. 2010).
[122] 119 Cong. Rec., 93rd Congress, 1st Session (Sept. 18, 1973).
[123] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
[124] *Id.*
[125] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (discussing the standard for reasonable interpretation under *Chevron*).

Justices on the Supreme Court from both ends of the political spectrum have long criticized the decision in *Chevron*. With the Court more conservative now than at any time since the 1930s[126] it is possible *Chevron* could be on its last legs. But this assumes that opposition to *Chevron* rests solely on the power it takes from the judiciary when in the past even the most conservative of justices have had no reservations invoking *Chevron* to defer to agency interpretations in furtherance of weakening environmental regulation.[127]

The arguments in favor of *Chevron* deference center around the political accountability and technical expertise of administrative agencies. In short, it is preferable to have agencies staffed with experts from relevant disciplines than the unelected judiciary filling gaps and interpreting ambiguities in statutes. If those interpretations run contrary to the political will of the people, the election of a new Executive can alter the course of agency action.[128]

B. The Weakening of *Chevron*

After *Chevron* a high bar was set to show that deference should be given to an agency's interpretation of their regulation that is promulgated with the law.[129] In *Michigan v. EPA,* Justice Scalia in a majority opinion shifted the deference jurisprudence.[130] The facts were as follows: the Clean Air Act had directed the EPA to decrease air pollutants emitted by power plants by considering promulgating regulations it deemed "appropriate and necessary."[131] The EPA declined to consider costs associated with the regulations and it was later determined to have cost the power plants roughly $10 billion per year.[132] The Court ruled in this case that the EPA was not reasonable in its interpretation of "appropriate and necessary" because they failed to consider all relevant factors in their interpretation and therefore, the EPA did not have a reasonable interpretation.[133]

Justice Scalia wrote in his opinion that an Agency's action under *Chevron* is only reasonable if it has considered all relevant factors to the action.[134] An agency's interpretation of an ambiguous statute must be reasonable.[135] In his concurrence, Justice Thomas wrote *Chevron* is overly broad and allows the executive branch (agencies) to circumvent the intent of the legislative branch and its intent.[136]

Recent cases from the Supreme Court have shown a trend towards purposivism. Apparent in major cases like *King v. Burwell*, in which Chief Justice Roberts sided with the Court's liberal justices and Justice Kennedy construed a provision of the Affordable Care Act to effectuate the purpose behind. It is revealing that Chief Justice Roberts, who was considered a reliable textualist,

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[126] Erwin Chemerinsky, *If You Think the Supreme Court is Conservative Now, Just Wait for Kennedy's Retirement*, SACRAMENTO BEE (June 28, 2018), https://www.sacbee.com/opinion/california-forum/article213952204.html.
[127] *See* Michigan v. EPA, 576 U.S. 743 (2015).
[128] Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 774 (2017) (discussing the precedent of *Chevron* as a sort of "counter-*Marbury*," limiting the parameters of judicial review).
[129] Bradley George Hubbard, *Deference to Agency Statutory Interpretation First Advanced in Litigation*, 80 U CHI. L. REV. at 447 (2013).
[130] *Michigan v. EPA, 576* U.S. at 743 .
[131] *Id.* at 743-44 .
[132] *Id.*at 749 .
[133] *Id.*at 743 .
[134] *Id.*at 752 .
[135] *Id.* at 751.
[136] *Id.* at 762 .

has been the only Justice in the majority on these decisions.[137] In the opinion, the Court announced to the surprise of some that in some cases involving questions of deep economic or political significance a court does not grant an administrative agency *Chevron* Deference.[138]

IX. Should the Rule Change Receive *Chevron* Deference?

While the Agencies interpretation of the foreseeable future language would be subject to the *Chevron* analysis, it is likely that the recession of the blanket rule would not. This is because Section 4 grants "the Services shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species."[139]

The *Chevron* analysis for the change to the interpretation of the ESA's foreseeable future language would look at whether the language is ambiguous and if so whether the Agencies offered a reasonable interpretation that does not run manifestly contrary to the ESA.[140] The standard of review in either case would be the arbitrary and capricious standard of review.[141] The U.S. Supreme Court in *Motor Vehicle Mfrs. Association of U.S., Inc. v. State Farm Mutual. Auto. Ins. Co*., explained in detail this standard of review. An agency acts arbitrarily or capriciously if it:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[142]

A. The Plain Meaning of Foreseeability

It is true that the drafters of the ESA did not provide a definition for the phrase "foreseeable future."[143] Because the ESA contains no statutory definition of "foreseeable future" it would be the place of the judiciary to determine whether the term "foreseeable future" was ambiguous, and if so, was the agency's interpretation of ESA a permissible one.[144] The common refrain among textualists is that legislative history should not be used to determine congressional intent. They warn against a reliance on legislative history, fearful that the objectives and motives of individual legislatures will supplant the text which was actually signed into law. Instead, a textualism seeks out the public meaning of words or phrases to get at the intent of a statute.[145]

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[137] *See e,g*, King v. Burwell, 576 U.S. 473 (2015).
[138] *Id.* at 474 .
[139] 16 U.S.C. § 1533(d).
[140] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
[141] See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).
[142] Am. Wildlands v. Kempthorne, 530 F.3d 991, 997-998 (D.C. Cir. 2008) (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43).
[143] *See* 16 U.S.C. §§ 1532, 1533.
[144] Harvard Law Review, *Purposivism and the Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1242 (2017).
[145] *Id.*

What is foreseeable is that which has the quality of being reasonably anticipated .[146] The phrase foreseeable future is ubiquitous in the law; from tort law to contracts and so on.[147] In each of the aforementioned contexts, foreseeability is inextricably linked to the principle that one must curb their behavior in order to reduce future harm when a possibility of that harm is known.[148] Hence, there is a strong argument that although a statutory definition was not contained in the ESA, the foreseeable future is not an ambiguous term. If it fails under *Chevron* doctrine, it will fall to the arbitrary and capricious. Running concurrently with *Chevron* is the Administrative Procedures Act's standard of review. If *Chevron* deference is not granted an agency must prove that their actions are permissible under that standard. In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*, the Court clarified that agencies should explain their decisions in technocratic, statutory, or scientifically driven terms, *not* political terms.[149] This Supreme Court decision clarified an important aspect of arbitrary and capricious review.

B. Using Legislative History, Embracing Purposivism

If a court were to disagree and find the text ambiguous, the inquiry would move to step two of the *Chevron* test.[150] Here, it can be argued that the text is manifestly contrary to the purpose of the Act. It was reiterated throughout the legislative history that the purpose of the Act was to save species whatever the cost. In the midst of a crisis lawmakers were looking for a flexible piece of legislation which would protect animals from the ills known and unknowable at the time. In his opinion for *Chevron*, Justice Stevens states that if an interpretation of an Act is "manifestly contrary" to the purpose of the Act it shall not receive deference. Again, there is a strong argument that the Agencies over-stepped in enacting a rule which will only make it more difficult for the Act to fulfill its purpose of protecting wildlife.

The principle that a reading of the legislative record constitutes an effective means of interpretation goes back to Blackstone's Commentaries.[151] In U.S. courts, the use of the legislative record as a touchstone for interpretation dates back to the infancy of the country's judiciary.[152] Even the consummate textualist, Justice Scalia, acknowledged the irrationality:

Policy evaluation is part of the traditional judicial tool-kit. Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce "absurd" results, or results less compatible with the reasons or purpose of the statute.[153] This, it seems, unquestionably involves judicial consideration and evaluation of competing policies and for precisely the same purpose for which agencies consider and evaluate them—to determine which one will best effectuate the statutory purpose.[154]

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[146] *Foreseeable*, Black's Law Dictionary (10 ed. 2014).
[147] Russ VerSteeg, *Perspectives on Foreseeability in the Law of Contracts and Torts: The Relationship Between "Intervening Causes" and "Impossibility,"* 2011 MICH. ST. L. REV. 1497, 1517 (2011).
[148] *Id.* at 1498–99.
[149] Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2, 4–6 (2009); Administrative Procedures Act, 5 U.S.C. § 706.
[150] Harvard Law Review, supra note 144, at 1232.
[151] John F. Manning, *Textualism as A Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 678–79 (1997).
[152] *Id.*
[153] *Id.* at 701.
[154] *Id.*

In the case of the ESA, the legislative history[155] exemplifies a well-defined intent. In 1973, a legislator present at the debate remarked "the most important feature of this bill is the provision extending protection to animals and plants that may become endangered in the foreseeable future."[156] "This legislation provides us with the means for preventative action."[157] Another legislator voted for the ESA because it was "a long range and comprehensive approach to the problem of environmental protection, and [when it comes to environmental protection] this is as it should be."[158] The only disagreement which shows up in the record is over whether or not the ESA will supplant state and local conservation efforts. Precaution to avoid crisis for future generations was a theme both sides coalesced around.[159]

The U.S Supreme Court first interpreted the Endangered Species Act in 1978 in *Tennessee Valley Authority v. Hill*.[160] Although the controversy in the case dealt with Section 7 of the Act, the Court found that the plain language of the ESA in its entirety, combined with the legislative history crystalized a clear Congressional intent.[161] "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."[162]

A reading of the extensive legislative history illustrates the humbling effect the environmental crisis of the time had on the country.[163] Lawmakers understood that "man" had disturbed the balance of nature-exterminating plants and animals, and that through this act of Congress, "man" would take action in preventing future harm.[164] With the passing of the ESA of 1973, the necessary tools were provided to protect not only the species that were on the verge of extinction, but also put in place the needed precautions to prevent other species from becoming endangered. Several drivers of species loss are mentioned in the legislative history: land-use changes and development, industrialization, exploitation by hunters, and others.[165] The common-thread among these drivers is that they are anthropogenic.

The ESA defines its relevant terms and phrases.[166] For example, endangered species, threatened species, and critical habitat.[167] At no point in the legislative history did Congress question what the phrase foreseeable future purported to mean. However, the ESA was referred to as "farsighted legislation," "a long-range, comprehensive approach" to protect species which "may one day become endangered."[168] One member said on the floor of the House, in support of his vote that "by heeding the warnings of *possible* extinction today, we [can] prevent tomorrow's

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[155] Justice White once stated the propriety of using legislative history "is common sense [in] that inquiry benefits from reviewing additional information rather than ignoring it." Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n. 4 (1991).
[156] 119 Cong. Rec., 93rd Congress, 1st Session (1973).
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] Doug Karpa, Note, *Loose Canons: The Supreme Court Guns for the Endangered Species Act in National Association of Home Builders v. Defenders of Wildlife*, 35 ECGLQ 291, 294 (2008).
[161] *Id.*
[162] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).
[163] 119 Cong. Rec., 93rd Congress, 1st Session (Sept. 18, 1973).
[164] *Id.*
[165] *Id.*
[166] 16 U.S.C. § 1532.
[167] *Id.*
[168] 119 Cong. Rec., 93rd Congress, 1st Session (Sept. 18, 1973).

crisis."[169] So, while the phrase foreseeable future was not strictly defined, the ESA's intent was to prevent species from reaching the point of extinction.[170]

If *Chevron* Deference was withheld by a court, both aspects of the rule change (the foreseeable future language and the recession of the blanket rule) would be subject to the arbitrary and capricious standard of review.[171] The U.S. Supreme Court has made clear that a rule is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[172]

Here, there is no record that the Agencies in drafting this rule change have taken into account what is the primary threat facing species today—climate change.[173] Additionally, with the data showing the number of extinctions in the U.S.,[174] it is difficult to understand how a decision to limit the scope of species which are eligible for protections is consistent with the evidence before the Agencies.

Furthermore, under the precedent of *Michigan v. EPA*, one could say that if the cost to business can factor into the reasonableness of an agency's interpretation there is no reason the cost of species loss should not also be accounted for. The monetary value of ecosystem services has been estimated to exceed the global GNP by 1.8 times. Because functioning ecosystems provide the basis of life support for humans and animals, the benefits of supporting it outweighs the cost of its disappearance.[175]

C. On Thin-Ice: Does a Shifting Court Place *Chevron* at Risk?

In *Kisor v. Wilkie*, the Court appeared to set new limits on the deference given to agencies interpreting their own regulations. Quoting Justice Stevens' opinion in *Chevron*, Justice Kagan in *Kisor* wrote that before courts get to the question of whether or not to grant an agency deference "[they] must exhaust all of the 'traditional tools' of [statutory] construction."[176] Moreover, Justice Kagan stated that deference is improper when the agency lacks any *comparative expertise*.[177]

Kisor was not a *Chevron* case, but rather a case dealing with the similar doctrine of *Auer* deference. Nevertheless, lower courts have taken some of the language from the *Kisor* opinion

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[169] *Id.*
[170] *Id.*
[171] See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
[172] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 44 (1984).
[173] Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, Fed. Reg., 35193-01 (July 25, 2018) (codified in 50 CFR § 424.11).
[174] Greenwald, et al., *supra* note 4.
[175] Keith H. Hirokawa & Elizabeth J. Porter, *Aligning Regulation With The Informational Need: Ecosystem Services And The Next Generation of Environmental Law*, 46 AKRON L. REV. 963, 973 (2013).
[176] Kisor v. Wilkie, 139 S.Ct. 2400, 2415 (2019).
[177] *Id.* at 2417 (emphasis added).

and cited it as part of their *Chevron* analysis in pure *Chevron* cases.[178] If this exemplifies a sort of merging of the two doctrines of agency deference, that provides a secondary reason why the Agency's interpretation of "foreseeable future" would not be subject to deference.[179]

There is also the growing phenomenon of "waiving *Chevron*." During the Trump administration, attorneys representing the federal government on several occasions "waived *Chevron*" to their own detriment.[180] The Supreme Court has never addressed whether *Chevron* deference can be waived but cited waiver as its reason for denying review to a case last term.[181] In the denial of cert for *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, Justice Gorsuch took yet another opportunity to opine *Chevron*:

> [T]hese days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations. How, in all this, can ordinary citizens be expected to keep up . . . [a]nd why should courts, charged with the in- dependent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?[182]

It is statements such as this which continue to put the future of *Chevron* in question. But for now, the doctrine remains the main hurdle for agencies. As long as *Chevron* stands, agencies will have the upper hand in court. That being said, the increasing willingness of the U.S. Supreme Court to restrict parts of the doctrine, combined with the way in which this new rule was written, provides those who wish to challenge the part of the Trump administration's rule change which defined "the foreseeable future" language and allowed for new considerations,[183] with a winning argument.

X. Conclusion

Scientists agree that now is not the time to relax the rules for listing species as threatened or endangered.[184] The United Nations' sobering 2019 report on the state of global biodiversity and the accelerated rate of species loss is a warning to the international community that we need to do more.[185] If the rule change discussed in this note were to be brought before a court today the *Chevron* Doctrine would weigh heavily on whether or not the administration's interpretation of the ESA's foreseeable future language warranted deference.

Whether or not the *Chevron* Doctrine has been weakened, there is a strong argument that the ESA rule change should not be entitled to deference. If *Center for Biological Diversity v.*

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[178] *See e.g.*, Braeburn Inc. v. United States FDA, 389 F. Supp. 301 (D.D.C. 2019); Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019); Belt v. P.F. Chang's China Bistro, Inc., 401 F.Supp.3d 512 (E.D. Pa 2019).

[179] The Court denied cert because the government told the court of appeals that, if the validity of its rule (re)interpreting a firearm statute "turns on the applicability of *Chevron*, it would prefer that the [r]ule be set aside rather than be upheld." The Court's denial was based on the Trump Administration "waiving *Chevron*" in the lower court. Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives. 920 F. 3d 1, 21 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part).

[180] *See* Harvard Law Review, *Waiving Chevron Deference*, 132 HARV. L. REV. 1520 (2019).

[181] *Id.* at 1525.

[182] Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 141 S.Ct. 789, 790 (2021).

[183] 50 C.F.R. § 424.11(d) (2019).

[184] Resnick, *supra* note 86.

[185] United Nations, *supra* note 13.

Bernhardt is not decided on the merits, there will likely be more lawsuits challenging the validity of the Agencies actions in promulgating this rule change. Either way, the legislative history depicts a clear intent to save species "at all cost." If two parts of the rule change discussed here have the anticipated effect of: (1) decreasing the protections afforded to threatened species and (2) allowing the Agencies to be near-sighted in their assessment of risk to the species then the rule change is manifestly contrary to the purpose of the ESA.[186] Even if the foreseeable future language is ambiguous, courts should find this an unreasonable and impermissible reading of the statute.

While the rescission of the blanket 4(d) blanket rule comports with the ESA and would likely be upheld, the Trump administration's interpretation of what constitutes a threatened species (i.e., what is the foreseeable future and what considerations can be taken into account in assessing threats to a species) could be successfully challenged in court. This is because deference is likely not warranted, even under *Chevron*.

Absent this, the APA arguments, not thoroughly explored in this note, would be the next option in seeking relief. If all else fails, the clearest remedy for shifting administrative policy continues to be at the ballot box, where the election of a new president, who can then appoint new agency heads, can overturn bad policy.

[186] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).