I've posted earlier about proposals by the Trump Administration to make significant changes to the regulations implementing the Endangered Species Act, some of the most substantial revisions to those regulations since they were overhauled in the early 1980s. A group of environmental law professors (including me) submitted comments on those proposed rules last month, with the support and direction of Bill Weeks at the Conservation Law Clinic at Indiana University. Below the jump is a summary of the major proposed changes that we responded to, and our responses. Our full comments are available here (ESA REG comment Dock 0006 F PDF) (for listing and critical habitat), here (ESA REG comment Docket Number 0007 F) (for Section 9 take) and here (ESA REG comment Docket Number 0009 F) (for Section 7 consultation).

Listing of species: The ESA has a process by which species are identified for protection under the Act.

Economic analysis of listing decisions: The Act prohibits the consideration of the economic cost of protecting a species when making listing decisions. However, the proposed revisions would require an analysis of the economic costs as part of the publication of those listing decisions. We noted that such an analysis would be a waste of resources (since it is legally irrelevant) and quite confusing to the public (since it would provide an economic analysis that is not relevant to the underlying agency decision).

Foreseeable future: The ESA requires the listing of species as threatened when they may become endangered in the foreseeable future – the idea is to allow early intervention for declining species before they become endangered. The proposed revisions would require a demonstration that the risk of becoming endangered in the foreseeable future is "probable," a standard that would make it harder to list species as threatened. This might particularly affect species that face threats due to climate change, which is a future harm that still has significant uncertainty about how it will affect any individual species. We raised a number of problems with the proposal: First, we should take into account not just the likelihood of a threat or harm in the future, but also the magnitude of the harm – a risk of catastrophic harm to a species in the future might warrant listing even if it is not probable to occur. Second, raising the bar for listing species as threatened is inconsistent with the precautionary nature of the ESA – a characteristic of the Act that the Supreme Court identified in its landmark *TVA v. Hill* decision in 1978. We stated that the correct understanding of foreseeable future means that any currently known threat should be considered a threat in the foreseeable future unless the weight of credible evidence shows that it is not likely to remain a threat in the foreseeable future.

Burden of proof for delisting species: The ESA has had a number of high-profile success

stories where species no longer require protection under the Act because they have recovered. The Act has a process for delisting these species (and downlisting them from endangered to threatened where recovery is only partial). However, the proposed regulations would review these delisting cases as if the species was being considered for listing in the first place. We note the risks of this approach, where species might be delisted and lose ESA protection, and threats might rapidly recur for the species, requiring relisting. (Worse, the frequent delays for listing species that now occur might mean that the delisted species declines substantially before it receives new ESA protection.) This is a particular concern where delisting a species under the ESA might remove important regulatory protections that were the reason the species recovered in the first place. Instead, we argue the agencies should require a showing in delisting decisions that the species is not any longer endangered and will remain non-endangered without the Act's protection for endangered species.

Critical habitat designation*:* The ESA provides some protections for the critical habitat of listed species. The definition and designation of critical habitat has been a flashpoint for implementation of the Act. The proposed regulations would make it easier for the agency to avoid designating critical habitat for listed species, for instance by allowing the agency to conclude that there is no likely regulatory benefit from designation of a particular area of critical habitat for a species. We noted that the agency has tried this approach in the past for many years, and courts have held that it is contrary to the terms of the statute.

Section 9 Take: The ESA prohibits any person from "taking" a member of an endangered animal species– take includes killing, capturing and harming individual members of a listed species, and includes some forms of destruction of habitat for listed species. The Act does not require the agencies to provide Section 9 take protections for species listed as threatened under the Act (while endangered species must be protected from take), but also allows the agencies to choose to impose those protections for threatened species where "necessary and advisable to provide for the conservation" of listed species under Section 4(d) of the Act. Currently, US Fish and Wildlife Service (FWS) regulations provide that all threatened species are covered by Section 9 take protections unless the agency drafts a species-specific rule that narrows protections. The National Oceanic and Atmospheric Administration (NOAA) has a different rule for the species it protects (basically marine species), where no Section 9 take protections apply to threatened species unless the agency specifically applies them. Because FWS manages a lot more species than NOAA under the ESA, the change could be a big deal (though it only applies for species listed in the future –currently listed species would retain their Section 9 protections). We noted that given the tight limits on FWS's listing budget (limits FWS itself has requested!) and the high number

of species that FWS had to consider for listing in any given year, the likely result of the proposed rule would either be (a) species waiting to be listed until a Section 4(d) rule is written; or (b) species being listed but not receiving take protection at all. Given the mismatch between agency budget and the number of species FWS is responsible for, we argued that the proposal is inconsistent with the statutory standard under Section 4(d) that protective rules must be "necessary and advisable to provide for the conservation" of listed species – at least unless FWS's listing budget substantially increased.

Section 7 Consultation: Finally, for all listed species the ESA prohibits federal agencies from taking actions that would jeopardize the existence of a listed species, or cause adverse modification to the critical habitat of a listed species. In determining whether jeopardy or adverse modification might occur, a federal agency has to consult with FWS or NOAA before taking the action.

Limiting consultation: The proposed regulations seek to significantly restrict the amount of consultation that federal agencies must undertake through a variety of revisions. First, they seek to prevent consultation for "on-going" federal actions – such as operation of a dam. This has been a major issue in litigation as dams (for instance) have major impacts on federally listed salmon runs in the Pacific Northwest. We responded that changes in operations of a dam are as much of a federal action as building the dam in the first place, and we believe the statute would continue to require consultation in those cases.

Second, the proposed changes would exclude from consultation the effects of actions that are "manifested through global processes and . . . cannot be measured at the scale of a listed species' current range." Basically, the proposal seeks to exclude climate change impacts from the consultation process – e.g., agencies leasing federal lands for coal development would not have to consider the climate change impacts of that development. We note that there is clear caselaw including climate change within the scope of harms covered by the ESA, and that the science of understanding how climate change has regional or local impacts is rapidly improving.

Third, the proposal would restrict consultation to matters within the action agency's jurisdiction or control – for instance, impacts of an agency action that are outside the agency's control would be excluded from consideration in consultation. A classic example would (again) be climate change, where the emissions from a federal project might contribute to climate that is overall outside the agency's control. Our response is that while the action agency may not be able to fully control effects or impacts outside their control, they may have jurisdiction to mitigate those impacts. For instance, the action agency may be able to take steps to minimize the harm to the listed species overall from the agency

action, which would offset the impacts from climate change as well.

Adverse modification: Lastly, the proposal would limit the scope of adverse modification to eliminate consideration of small harms to critical habitat. Our response is that this proposal would allow death by a thousand cuts to species habitat through the approval of a series of actions that have individually small, but cumulatively large impacts.