USDOI Secretary Bernhardt announcing the Trump Administration's new ESA regulations

The Endangered Species Act, enacted in 1973, has for most of its history been the most controversial and politically-charged of all the foundational environmental laws adopted by Congress in the 1970's. But despite its contentious history, opponents of the ESA have been unsuccessful in their efforts to weaken the law, either through significant Congressional amendments or regulatory changes.

Until now.

Both on the 2016 campaign trail and after his inauguration, President Trump railed against the ESA, blaming it for blocking development projects, stifling economic growth and harming private property owners. In the wake of the 2016 election, supporters of the ESA feared that Congress might indeed weaken the statute through legislative amendments. But even though Republicans controlled both the White House and both houses of Congress in 2017-18, Congressional action to amend or repeal the ESA was not forthcoming. With Democrats' recapture of the House of Representatives in November 2018, statutory amendments to the ESA became even less realistic. At that point, the Trump Administration initiated a formal rulemaking process designed to severely weaken the ESA through regulatory amendments. Those new regulations were finalized this week.

Stated simply, these regulatory changes represent the most dramatic erosion of the ESA's protections for threatened and endangered animal and plant species in the 46-year history of the statute.

U.S. Secretary of the Interior David Bernhardt in a statement characterized the changes as simple "improvements… designed to increase transparency and effectiveness and bring the administration of the Act into the 21st century." That's Orwellian nonsense. To the contrary, a careful examination of the newly-adopted regulations reveal the regulatory changes to instead constitute an alarming and unprecedented rollback of the ESA's historic protections of America's most at-risk animal and plant species.

Key features of the Trump Administration's regulatory changes include the following:

- The new regulations limit the ability of federal regulators at the U.S. Fish & Wildlife Service and the National Marine Fisheries Service to take climate change into consideration when considering whether to list particular plant or animal species as threatened or endangered. The revised provisions direct federal regulators in their listing decisions only to consider impacts that are "likely" rather than merely "possible." Similarly, the revised regulations give government regulators broad discretion in deciding what is meant by the term "foreseeable future." Critics of the Administration's actions note that this gives regulators wide latitude to disregard long-term, projected impacts of climate change such as increased temperatures, drought and sea level rise.
- The just-announced regulatory changes eliminate important protections previously afforded species listed as "threatened" under the ESA. (The statute defines threatened species as those that are "at risk of becoming endangered in the foreseeable future.") For over 40 years, both threatened and endangered species have benefited from many common protective measures under the so-called "4(f) rule." But the newly-announced regulations repeal those protections for threatened species, instead requiring the U.S. Fish & Wildlife Service to adopt new regulations–on an individual basis–for each threatened species newly-listed under the ESA. That's likely to prove difficult if not impossible for the Service to do.
- The new rules alter the way wildlife regulators designate "critical habitat" for a listed species' recovery. Under the new regulations, federal regulators must first consider protecting habitat areas currently occupied by the protected species before designating presently-unoccupied habitat. Previously, wildlife officials have made these critical habitat decisions concurrently. (These very ESA habitat issues were addressed by the U.S. Supreme Court late last year, in the case of *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*.)
- Perhaps most controversially, the amended regulations seek to eliminate longstanding provisions barring regulators from considering economic factors in determining whether a particular species should be listed under the ESA. But in enacting the ESA,

> it was *Congress* that mandated that listing decisions be based solely upon the best scientific information, rather than economic considerations. Court decisions interpreting the ESA over nearly a half century have consistently upheld that Congressional directive.

The new regulations, which are prospective in their application, formally take effect when they are published in the Federal Register. (That's expected to occur within the next several weeks.) Publication of the regulatory changes also commences a 30-day period for opponents of the changes to challenge them in court.

And legal challenges there will be. California Attorney General Xavier Becerra and Massachusetts Attorney General Maura Healey have already announced plans to lead a coalition of states in filing litigation to challenge the legality of the Trump Administration's new ESA regulations. And a separate coalition of the nation's major environmental organizations–including the Center for Biological Diversity, Natural Resources Defense Council and National Wildlife Federation–have similarly declared that they will file their own litigation challenge against the Trump Administration in the immediate future. Meanwhile, Congressional Democrats have threatened to seek repeal of the Administration's new ESA regulations, including through application of the Congressional Review Act.

Congressional intervention seems unlikely to be successful, since any efforts to repeal the Administration's regulations through either new legislation or invocation of the Congressional Review Act would likely be met with a presidential veto–one which Congress is unlikely to override by the requisite two-thirds majority. Litigation challenges, on the other hand, have a significantly greater chance of success. Particularly vulnerable is the Trump Administration's new regulatory provision seeking for the first time to inject economic considerations into the listing process. Inasmuch as Congress has seen fit to limit listing decisions solely to scientific data and considerations, it's difficult to see how the Administration's attempt to add economic factors to the listing equation will pass legal muster.

Even if the Trump Administration's alarming ESA regulatory changes withstand legal challenge, other avenues remain available to proponents of biodiversity and wildlife protection. For example, California is one of a number of states that have enacted their own Endangered Species Acts. These state ESAs can be amended or implemented to fill the regulatory gaps left by the federal government under its new rules.

In sum, the Endangered Species Act has unquestionably been a controversial environmental statute over nearly a half century. But the ESA's critically-important protections have doubtless forestalled the extinction of numerous animal and plant species–including such iconic creatures as the bald eagle, grizzly bear, Florida alligator, polar bear, humpback whale and manatee.

The United Nations recently reported that the global rate of species' extinctions is accelerating at an alarming rate, with some *1 million* species threatened with extinction worldwide. As in so many other areas of environmental law and policy, the Trump Administration's eviscerating revisions to federal ESA regulations run directly counter to sound science, public policy, existing law and the ecosystem concerns of the global community.