

PUBLIC SUBMISSION

Comment from CPAC Foundation's Center for Regulatory Freedom

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[Docket Document \(FWS-HQ-ES-2025-0008-0001\)](#) Comment

Comment

Attached, in PDF format, are the comments of the CPAC Foundation's Center for Regulatory Freedom.

Attachments

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CRF Comment PECE Information Collection FINAL 101025



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October 10, 2025

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Re: Comments Regarding FWS's Notice of Information Collection and Request for Comment Entitled, "Agency Information Collection Activities; Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE)," Docket Number FWS-HQ-ES-2025-0008

Below are comments of the American Conservative Union Foundation's (d/b/a. Conservative Political Action Coalition Foundation) (hereinafter "CPAC Foundation") Center for Regulatory Freedom (hereinafter "CRF") on the U.S. Department of the Interior's (DOI) Fish and Wildlife Service's (FWS) notice of information collection and request for comment entitled, "Agency Information Collection Activities; Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE)," Docket Number FWS-HQ-ES-2025-0008, published in the Federal Register on August 11, 2025.

CRF is a project of the CPAC Foundation, a non-profit, non-partisan 501(c)(3) research and education foundation. Our mission is to inject a common-sense perspective into the regulatory process, to ensure that the risks and costs of regulations are fully based on sound scientific and economic evidence, and to ensure that the voices, interests, and freedoms of Americans, and especially of small businesses, are fully represented in the regulatory process and debates. Finally, we work to ensure that regulatory proposals address real problems, that the proposals

serve to ameliorate those problems, and, perhaps most importantly, that those proposals do not, in fact, make public policy problems worse.

On March 28, 2003, FWS, in coordination with the DOI, National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), and the Department of Commerce (DOC), issued an announcement of a final policy to improve upon implementation of section 4 of the Endangered Species Act (ESA) and “ensure consistent and adequate evaluation of formalized conservation efforts...when making listing decisions under the Act.”¹ This policy, entitled “Policy for Evaluation of Conservation Efforts When Making Listing Decisions” (PECE), established an alternative means to change a FWS listing under the ESA, despite this process being omitted from the text of the ESA. PECE has remained a part of FWS’s policy guidance for over a decade, yet none of its provisions have ever been codified in the Code of Federal Regulations (CFR). Despite its lack of statutory support, FWS is requesting an extension without change of PECE’s associated information collection which, if approved, will extend the applicability of this guidance for three years and into the next administration.

CRF appreciates the opportunity to provide comments on FWS’s information collection request, but urges the agency, pursuant to the provisions of Executive Order 14219 (“Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Deregulatory Initiative”), to withdraw this information collection request and rescind PECE, as this policy is not based on the best reading of the underlying statutory authority, the ESA. CRF also recommends that PECE also be rescinded pursuant to the Supreme Court’s ruling in *Loper Bright v. Raimondo*, and that, for future endangered or threatened listing determinations, FWS adhere to the text and intent of the ESA.

Introduction

Congress enacted the ESA in 1973, aiming to establish a federal framework for the protection of vulnerable species and expand upon the provisions of preceding legislation, mainly the Endangered Species Preservation Act of 1966 (ESPA) and the Endangered Species Conservation Act of 1969 (ESCA). While the ESPA initially promulgated the first federal list of endangered species in the United States and subsequently outlawed harming listed species, the ESA drastically expanded the list’s associated powers and responsibilities. Additional statutory obligations in the ESA include mandatory designation of habitats of endangered species (“critical habitats”) and stronger legal protections for endangered animals, but the ESA’s most significant change vested the authority to administer the Act in FWS and NMFS. In transferring this responsibility, the ESA’s implementation became subject to the regulatory actions of these agencies and, by extension, their discretion.

¹ Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,100–15,115 (Mar. 28, 2003).

PECE was put forth in 2003 according to FWS's interpretation of the text of the ESA, specifically section 4(b)(1)(A)'s requirement that FWS make listing determinations "after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas."² From this provision, FWS assumed the authority to promulgate additional policy guidance allowing entities to institute preemptive conservation efforts that are "likely to make a difference in a species' status"³ and may influence listing decisions under section 4 of the ESA. PECE applies to all listing decisions enumerated in section 4, including findings on petitions to list species and decisions on whether to finalize or withdraw proposed listing rules.⁴ Because PECE's scope is effectively identical to that described in section 4, the extent of its impact warrants a thorough review of its adherence to the best reading of the ESA. CRF cannot support the extension, without change, of PECE's related information collection, as this policy guidance operates outside of the text of the ESA and is dependent upon FWS's subjective interpretation of a single provision in section 4, an interpretation which is now inconsistent with the Supreme Court's ruling in *Loper Bright*.

Endangered Species Act: Intent vs. Application

Section 2 – Findings, Purpose, and Policy

The most problematic aspect of PECE is its misinterpretation of the ESA's overarching purpose. Section 2(b) of the ESA definitively enumerates the purposes of the Act as follows:

"The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."⁵

Here, the ESA clearly states that its purposes are exclusive to those species already considered endangered or threatened, as its text makes no explicit mention of providing programs for the conservation for species that *may* be endangered or threatened in the future. PECE establishes a policy outside of the stated purposes of the ESA and yet cites the Act as its statutory authority. Therefore, PECE is incongruous with the intent and best reading of the ESA, as the legislation was not enacted to support preemptive conservation efforts for species that are not listed as

² 16 U.S.C. § 1533(b)(1)(A) (2018).

³ Agency Information Collection Activities; Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE), 90 Fed. Reg. 38,658, 38,658 (Notice of information collection; request for comment, Aug. 11, 2025).

⁴ Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,100 (Mar. 28, 2003).

⁵ 16 U.S.C. § 1531(b) (2018).

endangered or threatened and instead focuses its implementation on formally listed species. This is further affirmed in section 4, as it requires FWS to conduct, at least once every five years, “a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review...”⁶ The phrase “at the time of such review” mandates that FWS review species’ listing determinations according to their present status and not based upon conjecture or anticipated future status. When reading this provision in conjunction with the purposes described in section 2, it is clear that Congress intended the scope of the ESA to apply exclusively to species classified as endangered or threatened. Broadening the scope beyond that to include species that have the potential of being listed as endangered or threatened could potentially encompass all species, nullifying the ESA’s true purpose of protecting vulnerable species.

Section 3 – Definitions

It is important to note that there are definitional inconsistencies between PECE and the ESA, mainly concerning the term “conservation.” Section 3 of the ESA defines conservation as “the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”⁷ Section 3 goes on to provide a list of specific acceptable conservation methods and procedures, including, but not limited to, “all activities associated with scientific resources management.”⁸ FWS’s regulations at 50 C.F.R. § 424.02 provide the same definition, but PECE’s definition is entirely different. Instead, PECE states that conservation refers to “specific actions, activities, or programs designed to eliminate or reduce threats or otherwise improve the status of a species.”⁹ PECE’s definition completely changes the meaning of the word, as the ESA specifically narrows conservation activities to only those “which are *necessary*” to improve the status of endangered or threatened species to the point where measures under the Act are no longer necessary. PECE asserts that acceptable conservation methods under the ESA can include any actions that are merely “designed” to improve the status of a species, which is an erroneous interpretation of the text.

PECE evidently differs from the ESA in its definitions and is also inconsistent with FWS’s own regulatory definitions. 50 C.F.R. § 424.02 describes a “candidate species” as “any species being considered by the Secretary for listing as an endangered or threatened species, but not yet the subject of a proposed rule.”¹⁰ This definition is appropriate in the context of the ESA’s implementing regulation, as it provides a separate category for species that are not undergoing a

⁶ 16 U.S.C. § 1533(c)(2)(A) (2018).

⁷ 16 U.S.C. § 1532(3) (2018).

⁸ *Id.*

⁹ Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,100 (Mar. 28, 2003).

¹⁰ 50 C.F.R. § 424.02 (“Candidate”) (2024).

listing determination through the rulemaking process but are being considered for such determination. PECE expands upon the definition codified in the CFR:

“However, the FWS includes as candidate species those species for which the FWS has sufficient information on file relative to status and threats to support issuance of proposed listing rules. The NMFS includes as candidate species those species for which it has information indicating that listing may be warranted, but for which sufficient information to support actual proposed listing rules may be lacking. The term ‘candidate species’ used in this policy refers to those species designated as candidates by either of the Services.”¹¹

The codified regulatory definition for candidate species is structured around whether the Secretary and, by extension, FWS and NMFS, are actively considering listing that species as endangered or threatened. PECE contradicts this definition by instead centering the term around whether FWS and NMFS have “sufficient information” to support formally listing a species under the ESA. A species’ status as a “candidate species” is an informal designation indicating that a species is merely being considered for a listing determination and, according to the CFR, has nothing to do with the sufficiency of available information or how likely a species is to be listed as endangered or threatened. PECE should not be preserved through the extension of its related information collection, as its definitions are fundamentally incongruous with those explicitly set forth in the ESA and FWS’s regulations.

The ESA’s Erosion of Private Property Rights: Unintended Consequences, Predictable Harms

One of the most troubling consequences of the ESA—and policies like PECE that have grown out of it—is the steady erosion of private property rights in the name of species conservation. While the ESA was enacted with the laudable goal of protecting wildlife, its modern application has strayed far from that mission. Instead of working with private landowners, the Act increasingly works against them. And rather than fostering cooperation, it cultivates fear, uncertainty, and hostility toward conservation.

This is not just bad environmental policy—it’s bad governance.

As CPAC has long warned, federal environmental regulation has become a vehicle for creeping control over private land. PECE in particular allows FWS to evaluate the likelihood of success of future, voluntary conservation efforts—not based on results, but on projected intentions. That’s not science. It’s guesswork, and it gives the federal government open-ended power to interfere with land use based on what it thinks might happen, not what has happened.

¹¹ Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,100 (Mar. 28, 2003).

This speculative approach has one predictable result: landowners lose control of their land, often without notice or compensation, while bureaucrats expand their reach behind the scenes.

Regulatory Takings Without Due Process

Under the Fifth Amendment, government cannot take private property for public use without just compensation. But the ESA, especially when reinforced by PECE, gives federal agencies wide latitude to impose severe land-use restrictions—effectively “taking” private property—without ever triggering a formal takings claim. These are regulatory takings, and they sidestep the legal protections that should shield citizens from exactly this kind of government intrusion.

Roger Marzulla, former Assistant Attorney General for the Department of Justice’s Environment Division, has spent his career fighting these kinds of takings. In case after case, he has shown how the ESA strips landowners of economically viable uses of their land through habitat designations, activity prohibitions, and access restrictions—without any formal rulemaking, without compensation, and often without recourse. These decisions are not subject to meaningful oversight, and they rarely face public scrutiny. The consequences, however, are very real: land devalued, livelihoods ruined, and constitutional rights violated.

And through PECE, this control is exercised before a species is even listed. FWS can preemptively shape land use by dangling the threat of listing—or by suggesting that if landowners don’t comply with voluntary conservation plans, formal regulation may follow. That’s not cooperation. That’s coercion.

When Habitat Becomes a Liability

Nowhere is the ESA’s perverse effect more clearly demonstrated than in what R.J. Smith, founder of the Center for Private Conservation, described as the “shoot, shovel, and shut up” phenomenon. Smith, a passionate advocate for private conservation, understood that real conservation happens on private land, and that landowners are often the best stewards of wildlife. But when the law penalizes landowners for having the kind of habitat endangered species need, it creates exactly the wrong incentives.

If finding a rare species—or even creating the conditions for one—invites federal restrictions, landowners will take steps to ensure those species never show up. That might mean cutting down trees, draining wetlands, or removing brush—all to preemptively avoid the crushing burden of ESA enforcement. Smith saw this again and again, and he warned that unless landowners are treated as partners rather than targets, the ESA would not only fail to protect species, it would actively drive habitat destruction.

PECE only intensifies this fear. Because it allows agencies to intervene based on projected conservation outcomes, even considering the possibility of habitat improvements can be enough to draw regulatory scrutiny. The message this sends to private landowners is chilling: don't improve your land. Don't experiment with habitat restoration. Don't volunteer for conservation. Because if you do, the federal government might turn around and punish you for it.

Rule by Guidance, Not Law

Mark Pollot, former Special Counsel for Property Rights in the Reagan Administration, spent his career fighting what he called “takings by regulation.” He recognized that modern environmental law was increasingly being used not as a tool for solving problems, but as a mechanism for expanding federal control over land use—often without the accountability of formal rulemaking. PECE is a prime example of this problem.

Because PECE was never codified as a rule and was never subject to public notice and comment, it lacks the procedural safeguards that should constrain agency action. Yet it exerts enormous influence over listing decisions, land-use planning, and conservation agreements. The result is a shadow regulatory framework: one where agencies issue binding decisions without going through the binding process.

Pollot warned that when policy guidance becomes functionally equivalent to regulation—when landowners can lose their rights based on informal documents—constitutional boundaries are being crossed. And when those documents are used to leverage compliance through the threat of future regulation, the problem becomes not just a legal one, but a moral one. Citizens should not be forced to surrender their rights in order to avoid bureaucratic retaliation.

A Better Path: Property Rights as a Foundation for Conservation

The tragedy here is that the ESA could be far more effective if it embraced—not fought—private ownership. Voluntary conservation works best when it's built on clear property rights, not ambiguous threats. R.J. Smith argued persuasively that habitat restoration, species recovery, and biodiversity protection are most successful when landowners have security in their rights and incentives to improve their land.

But under the current regime, private conservation is risky. Participating in a conservation plan, entering into a habitat agreement, or simply having the kind of land a species might prefer—all can invite burdensome regulation. Instead of fostering a culture of stewardship, the ESA and PECE breed resentment and avoidance.

Real conservation doesn't come from Washington. It comes from people who live on the land and work it every day. It comes from giving them the freedom to innovate, the space to act, and the assurance that if they do the right thing, they won't be punished for it.

Until that vision replaces the bureaucratic overreach that defines policies like PECE, the ESA will continue to undermine both private rights and species protection. It's time to restore the proper balance—where conservation is built on consent, not coercion; where agencies serve the public, not dominate it; and where property rights are recognized not as obstacles, but as the foundation for a truly sustainable future.

Misinterpretation of Section 4 of the ESA

Revisions by Regulation

PECE was not put forth as a formal rulemaking and is technically not binding, as none of its provisions are codified in the CFR. However, because PECE's evaluation criteria guide and influence FWS's listing determinations, this policy guidance consequently shapes implementation of the ESA despite its failure to adhere to the Administrative Procedure Act's (APA) publication requirements, as well as those in section 4 of the ESA. Section 4(a)(1) states that, "The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species,"¹² indicating that the ESA requires all listing determinations be made according to the APA's formal rulemaking process. The ESA similarly requires the same for any revisions to FWS's listing determinations, mandating that the Secretary revise its designations "by regulation promulgated in accordance with subsection (b)..."¹³ PECE allows FWS to bypass these two requirements, as entities can preemptively advocate for a particular designation and FWS can make a preemptive, informal listing determination based upon that entity's conservation agreement without ever having to publish any such determinations in the Federal Register. Due to PECE's present circumvention of the APA and specific provisions in the ESA, CRF recommends that FWS withdraw its information collection request and rescind PECE, pursuant to the best reading of the ESA and present regulations.

Petition Process and PECE's Redundancy

PECE "identifies criteria [FWS] will use in determining whether formalized conservation efforts that have yet to be implemented or show effectiveness contribute to making listing a species as threatened or endangered unnecessary."¹⁴ Interestingly, the ESA already contains a process by which interested persons can advocate for a revision of a species' listing, and if a petition presents "substantial scientific or commercial information indicating that the petitioned action

¹² 16 U.S.C. § 1533(a)(1) (2018).

¹³ 16 U.S.C. § 1533(a)(3) (2018).

¹⁴ Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,100 (Mar. 28, 2003).

may be warranted,”¹⁵ the species’ status will be promptly reviewed. The ESA’s petition process already allows entities to provide additional information regarding the status of a species, and such information could include changes to the species’ status since implementing conservation efforts, making PECE’s framework redundant. Additionally, section 4(b)(3)(B)(i) and (ii) mandate that findings based on petitions must be promptly published in the Federal Register, a requirement that does not apply to FWS’s PECE-based determinations. CRF recommends that FWS rescind PECE and withdraw its information collection request, as section 4 of the ESA already provides a comprehensive petition process by which the public can advocate for the revision of a species’ status. PECE’s additional policy guidance is redundant, unnecessary, and only fosters regulatory confusion and obscurity.

Judicial Review

Among the plethora of procedural requirements in the ESA, section 4(b)(3)(C)(ii) mandates that, “Any negative finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.”¹⁶ Unfortunately, any negative determinations made pursuant to PECE’s criteria are not given the same protection and opportunity for formal appeal to a judicial body outside of FWS’s purview. Since PECE determinations are not subject to judicial review, such determinations are made entirely according to FWS’s discretion and the agency’s own interpretation of the ESA. The deference to FWS’s interpretation and failure to incorporate judicial review as an oversight mechanism for PECE determinations contradicts the protections expressly provided in the ESA.

Opportunity to Comment

PECE most blatantly obstructs the implementation of section 4(b)(5), subparagraphs (A) through (E), as such provisions mandate that FWS publish a general notice and the complete text of the proposed regulation in the Federal Register, “with respect to any regulation proposed by the Secretary to implement a determination, designation, or revision.”¹⁷ Because PECE is not a formal rule, FWS’s determinations regarding conservation agreements are not statutorily obligated to fulfill the requirements in section (4)(b)(5) and are not required to be published in the Federal Register. This is a clear circumvention of the intent of the ESA and allows FWS to bypass providing the public with an opportunity to comment on its decisions.

Executive Order 14219

These comments have established that PECE is a policy that fails to adhere to the plain meaning of the text of the ESA, making this policy inconsistent with current federal objectives. Section 2(iii) of Executive Order 14219 directed all agency heads to review existing regulations and

¹⁵ 16 U.S.C. § 1533(b)(3)(A) (2018).

¹⁶ 16 U.S.C. § 1533(b)(3)(C)(ii) (2018).

¹⁷ 16 U.S.C. § 1533(b)(5)(A)(i) (2018).

identify regulations that are “based on anything other than the best reading of the underlying statutory authority or prohibition.”¹⁸ Section 3 of the order goes on to require that agencies “preserve their limited enforcement resources by generally de-prioritizing actions to enforce regulations that are based on anything other than the best reading of a statute,”¹⁹ re-emphasizing that the official policy of the United States demands that all federal government entities adhere to the best reading and plain meaning of each statute. Pursuant to the directives of Executive Order 14219, CRF recommends that FWS rescind PECE and withdraw its related information collection request due to the policy’s failure to adhere to the best reading of the ESA.

Loper Bright Enterprises v. Raimondo (2024)

In the 1984 Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court held that, “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”²⁰ This concept, colloquially regarded as “*Chevron* deference,” drastically expanded federal agencies’ authority to implement legislation according to each’s subjective interpretation of the text, allowing agencies to read various meanings into certain ambiguous phrases and alter the effect of the law after it has been formally enacted. In 2024, the Supreme Court overturned this legal concept in *Loper Bright Enterprises v. Raimondo*, correcting its prior opinion and stating instead that “the APA specifies that the courts, not agencies, will decide ‘all relevant questions of law’ arising on review of agency action...even those involving ambiguous laws.”²¹ *Loper Bright* replaced *Chevron*’s ruling and, by extension, the previous framework authorizing federal agencies to freely interpret legislation. In *Loper Bright*, the Court also determined that courts, under the APA, “may not defer to an agency interpretation of the law simply because a statute is ambiguous,” and that when Congress delegates authority to an agency, “courts must respect the delegation, while ensuring that the agency acts within it.”²²

The Presidential Memorandum entitled, “Directing the Repeal of Unlawful Regulations,” required the heads of all executive departments and agencies to “evaluate each existing regulation’s lawfulness” under numerous Supreme Court cases, including *Loper Bright*.²³ Because PECE depends entirely upon FWS’s own interpretation of section 4(b)(1)(A) rather than the best reading of the ESA and Congress’ intent when promulgating the Act, CRF recommends that FWS rescind PECE and withdraw its information collection request pursuant to the aforementioned memorandum as well as the Supreme Court’s ruling in *Loper Bright* and subsequent nullification of *Chevron* deference.

¹⁸ Ensuring Lawful Governance and Implementing the President’s “Department of Government Efficiency” Deregulatory Initiative, Exec. Order No. 14,219, 90 Fed. Reg. 10,583, 10,583 (Feb. 25, 2025).

¹⁹ Id.

²⁰ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

²¹ *Loper Bright Enters. v. Raimondo*, No. 22-451, slip op. at 1 (U.S. June 28, 2024).

²² Id.

²³ Memorandum on Directing the Repeal of Unlawful Regulations, 2025 Daily Comp. Pres. Doc. 261 (Apr. 9, 2025).

Conclusion

Section 4 of the ESA outlines the Secretary of the Interior's and, by extension, FWS's, responsibilities concerning listing determinations and the designation of certain species as endangered or threatened. No where in this section is the directive nor authorization for FWS to prematurely make listing determinations according to preemptive conservation efforts; determinations which are not subject to the same publication requirements as formal designations and listing rules under the ESA. In fact, FWS admits in PECE's Federal Register notice that "no specific provisions in the Act authorize conservation agreements in lieu of listing."²⁴ PECE more broadly misunderstands the purpose of the ESA, arguing that "species conservation would be compromised if, we wait until a threat is actually impacting populations before we list the species as threatened or endangered."²⁵ Congress intended for the ESA to function as a responsive measure to threats plaguing populations of vulnerable species, and FWS's insistence that the law is instead a preventative measure contradicts its purpose.

If this information collection request is approved, PECE's applicability will be extended for another three years, prolonging FWS's own interpretation of the ESA in direct violation of the Supreme Court's ruling in *Loper Bright*. Pursuant to the directives of Executive Order 14219 and the best reading of the ESA, CRF recommends that FWS withdraw this information collection request and rescind PECE, as this policy guidance is incongruous with the plain meaning of the ESA and the Supreme Court's ruling in *Loper Bright*.

If you have any questions, do not hesitate to contact me at ALanger@conservative.org.

Thank you,



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²⁴ Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,100 (Mar. 28, 2003).

²⁵ Id.