



HOUSE COMMITTEE ON
NATURAL RESOURCES
CHAIRMAN BRUCE WESTERMAN

To: Subcommittee on Water, Wildlife and Fisheries Republican Members
From: Subcommittee on Water, Wildlife and Fisheries staff: Annick Miller, x58331
(annick.miller@mail.house.gov) and Doug Levine (doug.levine@mail.house.gov)
Date: Tuesday, July 18, 2023
Subject: Oversight Hearing on “*ESA at 50: The Destructive Cost of the ESA.*”

The Subcommittee on Water, Wildlife and Fisheries will hold an oversight hearing on “*ESA at 50: The Destructive Cost of the ESA,*” on **Tuesday, July 18, 2023, at 2:00 p.m. EDT in room 1324 Longworth House Office Building.**

Member offices are requested to notify Thomas Shipman (thomas.shipman@mail.house.gov) by 4:30 p.m. on Monday, July 17, 2023, if their Member intends to participate in the hearing.

I. KEY MESSAGES

- As 2023 is the 50th anniversary of the Endangered Species Act (ESA), Congress should examine how the Act is being implemented, its success in *recovering* listed species, and the cost it imposes on American families.
- The Biden administration has been implementing ESA with a “whatever the cost” mentality, impacting the economic opportunity of rural communities and threatening the property rights of their citizens. Instead, the Biden administration should be listening to local voices and incentivizing states and private landowners to take conservation measures that benefit species.
- The Biden administration is rolling back necessary reforms that were made by the Trump administration and which modernized the ESA. This is harming species recovery, conservation, and imposing unjust costs on Americans.
- Empowering states, tribes, local governments, and private landowners in the ESA decision making process is the best path forward for both the health of species and the sustainability of local communities that coexist with species.

II. WITNESSES

- **Ms. Janet Coit**, Deputy Administrator, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Washington, D.C.
- **The Honorable Martha Williams**, Director, U.S. Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C.
- **Mr. Justin Jahnz**, Chief Executive Officer, East Central Energy, Braham, MN
- **Mr. Sean Vibbert**, Owner, Obsidian Seed Company, Madras, OR
- **Mr. Jonathan Wood**, Vice President of Law and Policy, Property and Environment Research Center, Bozeman, MT
- **Mr. Dan Ashe**, President and CEO, Association of Zoos and Aquariums, Silver Spring, MD [*minority witness*]

III. BACKGROUND

Endangered Species Act

The Endangered Species Act (P.L. 93-205 or the Act) was enacted in 1973:

“...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 the Act.¹

This mandate impacts federal agencies, state and local entities, private organizations, and individuals by covering federal “actions” such as funding, permitting, licensing, and the granting of easements and rights-of-ways. The ESA also prohibits the taking of listed species, which applies

Listings of Domestic Species under the Endangered Species Act

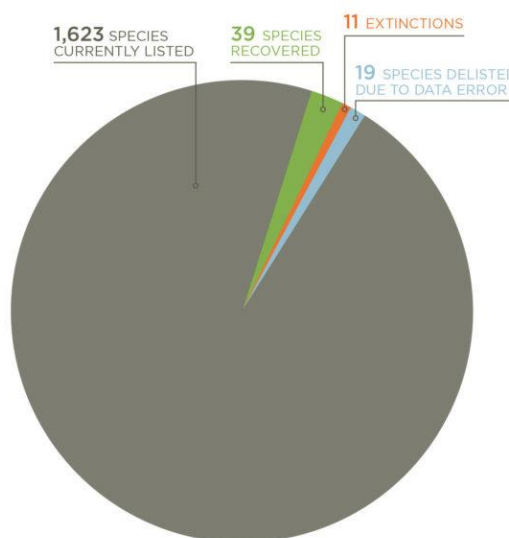


Figure 1: ESA Listing Data as of 2018 | Source: PERC

¹ Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.

directly to private individuals without the requirement of a federal nexus.²

The last time Congress significantly amended the ESA was in 1988.³ Despite these revisions, the main provisions of the ESA remain intact and govern species conservation efforts today.

Under the current framework, Section 4 of the ESA charges the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) to review and act on petitions to list species as threatened or endangered and to designate their critical habitat.⁴ Private lands play a significant role in managing and recovery endangered and threatened species. As environmentalist Aldo Leopold put it, "conservation will ultimately boil down to rewarding the private landowner who conserves the public interest."⁵ In February 2023, the USFWS reported that "two-thirds of federally listed species have at least some habitat on private land, and some species have most of their remaining habitat on private land."⁶ For example, according to the Audubon Society more than 80 percent of the grassland and wetlands that provide essential bird habitat are in private ownership.⁷

The consultation process between federal agencies with USFWS and/or NMFS as required by Section 7 and the consultation process for businesses and citizens with USFWS and/or NMFS as required by Section 10 have become a point of concern with the significant uptick in the need for new energy transmission projects, the sometimes decades-plus long consultation process increases project costs and has created an atmosphere of uncertainty.⁸

Litigation and threats of litigation on both substantive and procedural grounds have significantly increased and are upending the listing and delisting process under the ESA.⁹ Historically, Republican Members of Congress have raised questions over the petition and listing process, rigid timeframes, and lack of data transparency supporting decisions.¹⁰

This Congress, the Subcommittee on Water, Wildlife and Fisheries (WWF Subcommittee) has held two hearings on legislation to reform the ESA. The hearings included bills delisting the gray wolf in the lower 48 states and the grizzly bear in the Greater Yellowstone and Northern Continental Divide Ecosystems. In addition, the Subcommittee considered Congressional Review Act resolutions that would undo the Biden administration's ESA regulatory overreach, including the rescission of the Trump administration's habitat definition rule. These hearings resulted in six bills being marked up and favorably reported by the House Committee on Natural

² *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) ([testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 10](#)).

³ Public Law 100-478, the Endangered Species Act Amendment of 1988. <https://www.congress.gov/100/STATUTE-102/STATUTE-102-Pg2306.pdf>

⁴ *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) ([testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 10](#)).

⁵ Flader, S.L., Callicott, J.B., & Leopold, A. (1992). *The River of the mother of God: and other Essays by Aldo Leopold*. Madison: University of Wisconsin Press.

⁶ "ESA Basics: 50 Years of Conserving Endangered Species." U.S. Fish and Wildlife Service. 2/1/23. [Endangered Species Act Basics \(fws.gov\)](#)

⁷ Wilsey1, CB, J Grand, J Wu, N Michel, J Grogan-Brown, B Trusty. 2019. North American Grasslands. National Audubon Society, New York, New York, USA. [audubon_north_american_grasslands_birds_report-final.pdf \(nas-national-prod.s3.amazonaws.com\)](#)

⁸ "Interior OKs massive power line key for West's renewables." Jason Plautz. E&E News. 4/12/23. [Interior OKs massive power line key for West's renewables - E&E News by POLITICO \(eenews.net\)](#)

⁹ "Federal Court Strikes Down ESA Rule by Fiat." Kat Dwyer. 7/6/22. <https://perc.org/2022/07/06/federal-court-strikes-down-esa-rules-by-fiat/>

¹⁰ Endangered Species Act Congressional Working Group. "Report, Findings, and Recommendations."

<https://www.endangeredspecieslawandpolicy.com/assets/htmldocuments/blog/4/2014/10/finalreportandrecommendations-113.pdf>

Resources on April 27, 2023. A memo prepared for the markup containing additional information on the specific pieces of legislation can be found [here](#). Each of these bills received unanimous Republican support.¹¹

Biden Administration Actions on the ESA

On January 20, 2021, President Biden issued Executive Order (EO) 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”¹² This EO instructed all federal departments and agencies to review actions taken by the Trump administration and to identify which actions should be suspended, revised, or rescinded due to not abiding by the goals of the order.¹³

In addition, the Biden administration published a fact sheet that contained a “non-exclusive” list of actions that warranted review.¹⁴ Included in that list were fourteen actions taken by the Department of the Interior and three actions taken by the Department of Commerce that pertained to the ESA.¹⁵ These actions included species specific listing decisions related to the northern spotted owl, gray wolf, and greater sage grouse. In addition, rules that made changes to the ways Section 4 and Section 7 are implemented were also listed as actions needing to be scrutinized by agencies.¹⁶ As a result of the EO, many of these Trump administration reforms have either been rescinded or revised by the Biden administration through the rulemaking process.

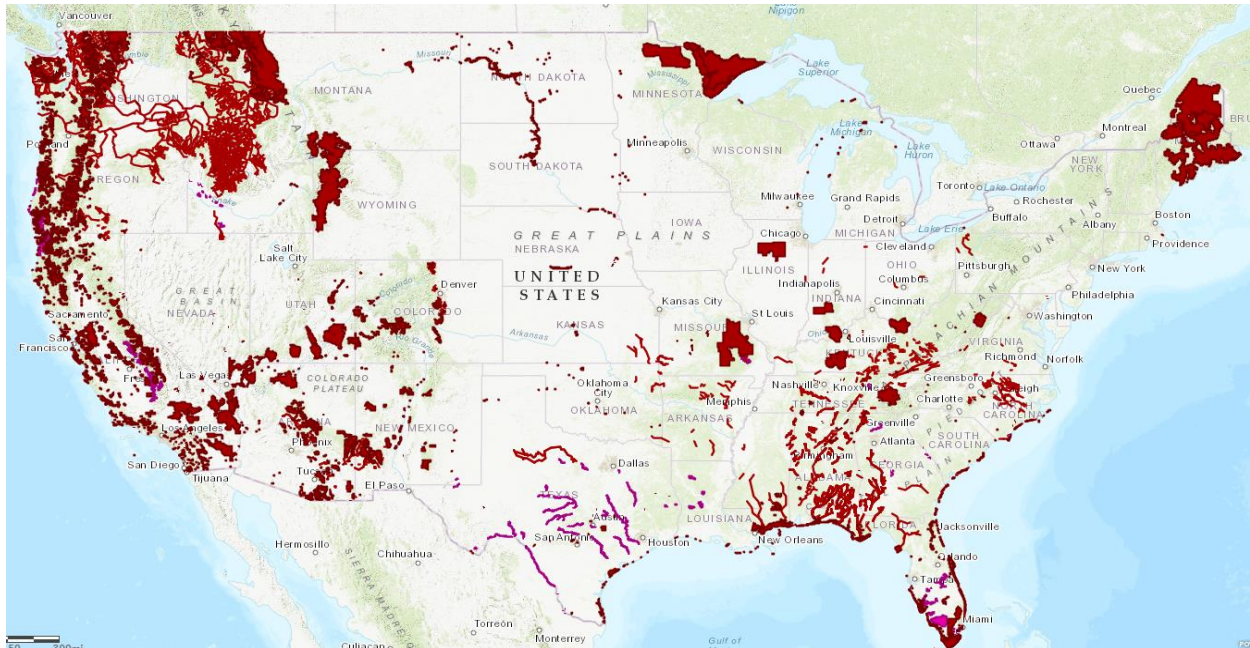


Figure 2: Map of Critical Habitat Designations in the Lower 48 States | Source: USFWS

¹¹ Full Committee Markup, House Committee on Natural Resources, April 27, 2023.

¹² <https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=413102>

¹³ [86 FR 7037](#)

¹⁴ *Id.*

¹⁵ “Fact Sheet: List of Agency Actions for Review.” The White House. 1/20/21. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>

¹⁶ *Id.*

¹⁷ *Id.*

2022 Rulemakings: On June 24, 2022, the USFWS and NMFS announced that they were rescinding the Trump administration’s regulatory definition of “habitat.”¹⁷ The regulatory definition of habitat was spurred by the U.S. Supreme Court decision in *Weyerhaeuser Co. v. U.S. FWS* which stated an area must logically be “habitat” for an area to meet the definition of “critical habitat” under the ESA.¹⁸ The rule defined “habitat” as an area that **currently or periodically** (emphasis added) contains the resources and conditions necessary to support one or more life processes of species.¹⁹ Without that definition in place, the Biden administration is proposing critical habitat on a case-by-case basis. In response, the Committee on Natural Resources favorably reported a Congressional Review Act resolution that reinstates the Trump administration’s definition of “habitat.”²⁰

On July 21, 2022, the USFWS announced it was rescinding a Trump administration rule known as the “Critical Habitat Exclusion Rule.”²¹ This rule required the USFWS to publish an analysis with every critical habitat designation proposal that identified areas that may be excluded from being designated as critical habitat for economic, national security, or other reasons.²² The Trump administration rule was also in accordance with the *Weyerhaeuser* case, as the Court ruled that the USFWS and NMFS may withhold from designating areas as critical habitat if the economic impacts outweigh the benefit to the species.²³ As with the habitat definition rule, the USFWS’s policy has fallen back to case-by-case decisions regarding why it excludes areas from critical habitat designations.²⁴ These actions give little certainty to stakeholders and give the agencies an oversized amount of discretion.



Figure 3 Dusky Gopher Frog, the species that was the subject of *Weyerhaeuser* |Source: U.S. Forest Service

2023 Rulemakings: On June 21, 2023, the USFWS and NMFS announced they were revising three 2019 Trump administration rules.²⁵ These pertained to the implementation of Section 4 and Section 7 of the ESA. Section 4 sets forth how USFWS and NMFS can list, delist, and designate

¹⁷ “U.S. Fish and Wildlife Service and NOAA Fisheries Rescind Regulatory Definition of “Habitat” Under the Endangered Species Act.” Marilyn Kitchell and Lauren Gaches. U.S. Fish and Wildlife Service. 6/23/2022. [Rescind Regulatory Definition of “Habitat” Under the Endangered Species Act | U.S. Fish & Wildlife Service \(fws.gov\)](#)

¹⁸ “Final Rules Amending ESA Critical Habitat Regulations.” Erin H. Ward and Pervaze A. Sheikh. Congressional Research Service. [IF11740 \(congress.gov\)](#)

¹⁹ “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat.” 87 FR 37757. [Federal Register: Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat](#)

²⁰ H. Rept. 118-95: H.J.Res.46 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Marine Fisheries Service relating to “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat”. <https://www.congress.gov/118/crpt/hrpt95/CRPT-118hrpt95.pdf>

²¹ [87 FR 43433](#)

²² *Id.*

²³ “Final Rules Amending ESA Critical Habitat Regulations.” Erin H. Ward and Pervaze A. Sheikh. Congressional Research Service. [IF11740 \(congress.gov\)](#)

²⁴ [87 FR 43433](#)

²⁵ “Endangered Species Act Regulation Revisions.” U.S. Fish and Wildlife Service. 6/23/23. [Endangered Species Act Regulation Revisions | U.S. Fish & Wildlife Service \(fws.gov\)](#)

the critical habitat for listed species. Section 7 governs the procedures by which federal agencies must consult with the USFWS and NMFS when a federal action may have an impact on a listed species.

Included in these proposed rules is the return of the so called “blanket 4(d) rule” for the USFWS, which has never been adopted by NMFS and was removed by the Trump administration in 2019.²⁶ The “blanket 4(d) rule” allows for threatened species to be given most of the same protections as endangered species. This rule goes against the longstanding species recovery framework by effectively removing positive incentives for affected parties that result in down listing a listed species and lower regulatory burdens.

Under the Trump administration rule, implementation of the 4(d) rule required regulations to be tailored for a particular threatened species. The USFWS recognized that species-specific 4(d) rules are beneficial to species conservation when it removed the rule in 2019.²⁷ In addition, what makes the return of the “blanket 4(d) rule” perplexing is that it was not listed as an action for review under EO 13990.²⁸ Since the Biden administration took office, USFWS has listed fourteen species as threatened, each time deciding not to utilize the 4(d) rule and instead adopting a species-specific approach.²⁹

Also included were changes to how “unoccupied critical habitat” can be designed under Section 4.³⁰ Under the proposed changes, the USFWS and NMFS would remove the need, when designating unoccupied critical habitat, for the Secretary to be “reasonably certain” that an area will contribute to conservation of the species and that “it contains one or more of the physical or biological features essential to the conservation of the species.”³¹ The proposed rule also says “the proposed revision removes unnecessary constraints to the Secretaries duty to consider designation of unoccupied areas.”³²

²⁶ [88 FR 40742](#)

²⁷ [84 FR 44753](#)

²⁸ “Fact Sheet: List of Agency Actions for Review.” The White House. 1/20/21. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>

²⁹ Fed. Reg. 25,512 (April 27, 2023) (Big Creek crayfish and St. Francis River crayfish); 88 Fed. Reg. 21844 (April 11, 2023) (Bracted Twistflower); 88 Fed. Reg. 19004 (March 30, 2023) (Egyptian tortoise); 88 Fed. Reg. 14,794 (Mar. 9, 2023) (Longsolid and Round Hickorynut); 87 FR 76,882 (Dec. 15, 2022) (whitebark pine); 87 Fed. Reg. 73,655 (Dec. 1, 2022) (Puerto Rican Harlequin Butterfly); 87 FR 72,674 (Nov. 25, 2022) (lesser prairie chicken); 87 FR 67,380 (Nov. 8, 2022) (sickle darter); 87 Fed. Reg. 64,700 (Oct. 27, 2022) (emperor penguin); 87 FR 546 (Jan. 5, 2022) (Panama City crayfish); 86 Fed. Reg. 72,394 (Dec. 21, 2021) (Hermes Copper butterfly); 86 Fed. Reg. 64,000 (Nov. 16, 2021) (Atlantic pigtoe); 86 FR 48,545 (Aug. 30, 2021) (Bartram’s Stonecrop); 86 Fed. Reg. 30,688 (June 9, 2021) (Neuse River waterdog).

³⁰ [88 FR 40764](#)

³¹ *Id.* See page 40769

³² *Id.*

Critical habitat designations that include unoccupied areas can be especially devastating to local economies. An example of this would be the imposition of critical habitat for the northern spotted owl in the Pacific Northwest, especially Oregon. Studies have shown that the listing of the northern spotted owl and its 9.6 million acres of associated critical habitat³³ have caused the loss of at least 32,000 timber jobs.³⁴ The Trump administration shrunk that critical habitat designation by 3.4 million acres before leaving office in 2021, citing that the benefits of excluding the acreage from critical habitat outweighed the benefits to the species of designating the acreage.³⁵ However, as a part of EO 33990, the Biden administration revised the Trump administration action by only removing 204,294 acres from critical habitat. As rationale the Biden administration stated the previous rule lacked sufficient rationale and justification.³⁶

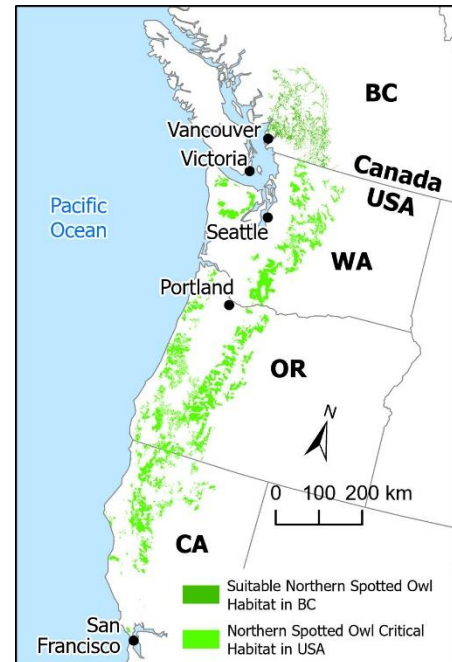


Figure 4: Northern Spotted Owl Critical Habitat | Source: Wilderness Committee

Presently, the USFWS and NMFS are also proposing changes to how Section 7 is implemented.³⁷ Section 7 governs how other federal agencies must consult with the USFWS and/or NMFS when a proposed action may affect a listed species. When an activity, like a forest management project, construction of a dam, or any federal infrastructure project might impact critical habitat for a listed species, a consultation process is required with USFWS and/or NMFS under Section 7.³⁸ This process can take years and can disincentivize investments into critical infrastructure. In fact, the USFWS recently submitted a report to Congress on the difficulties they are having in conducting Section 7 consultations in a timely manner. That report can be found [here](#).

The proposed rule makes changes to the definition of “effects of the action” and “environmental baseline,” and revises provisions related to reasonable and prudent measures (RPMs) when it relates to the incidental take of a listed species.³⁹ Of particular concern is the elimination of clarifying language that specified that an effects analysis is limited to aspects of the proposed action that are “reasonably certain to occur.”⁴⁰ This action would give the USFWS and NMFS wide latitude to review aspects of project proposals that would likely have no impact on the species in question and could lead to additional costs and delays in the permitting process. The rule also removes the need for the USFWS and NMFS to demonstrate that effects that are “reasonably certain to occur” must be accompanied by “clear and substantial information,”

³³ “USFWS Threatened & Endangered Species Active Critical Habitat Report.” U.S. Fish and Wildlife Service. 4/3/2023. [USFWS Threatened & Endangered Species Active Critical Habitat Report](#)

³⁴ “Labor market impact of land protection: The Northern Spotted Owl.” Ann E. Ferris and Eyal G. Frank. *Journal of Environmental Economics and Management*, Volume 109, September 2021, 102480. <https://www.sciencedirect.com/science/article/abs/pii/S0095069621000589>

³⁵ [86 FR 4820](#)

³⁶ [86 FR 62606](#)

³⁷ [88 FR 40753](#)

³⁸ “Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects.” Erin H. Ward, R. Eliot Crafton, Pervaze A. Sheikh. Congressional Research Service. [Endangered Species Act \(ESA\) Section 7 Consultation and Infrastructure Projects \(everycrsreport.com\)](#)

³⁹ [88 FR 40753](#)

⁴⁰ *Id.*

instead citing the phrase in the ESA, “best scientific and commercial data available,” as an adequate standard.⁴¹

The rule also proposes to reverse a long-standing policy that the USFWS and NMFS cannot impose RPMs outside the “action area” for a project as a way to mitigate for impacts on the species. RPMs are defined as actions the USFWS Director and the NMFS Administrator believe are necessary or appropriate to minimize the impacts of the incidental take of a species.⁴² Imposing RPMs outside the action area of the project could lead to costly new requirements and make some projects untenable.

Costs of the ESA

The ESA and its implementation have inherent costs on the federal government, regulated industries, and private landowners. According to a 2014 report by the USFWS the “median cost for preparing and publishing a 90-day finding is \$39,276; for a 12-month finding, \$100,690; for a proposed rule with critical habitat, \$345,000; and for a final listing rule with critical habitat, \$305,000.”⁴³ A 2022 report published by the USFWS did not give up-to-date numbers on costs, but did state:

“[t]he number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. Our practice of proposing to designate critical habitat concurrently with listing domestic species requires additional coordination and an analysis of the economic impacts of the designation, and thus adds to the complexity and cost of our work.”⁴⁴

When Congress amended the ESA in 1988, it included a mandate that the USFWS and NMFS submit a report to Congress each fiscal year on expenditures for listed species. The most recent report by USFWS was published for Fiscal Year 2020 and it states that federal agencies reported

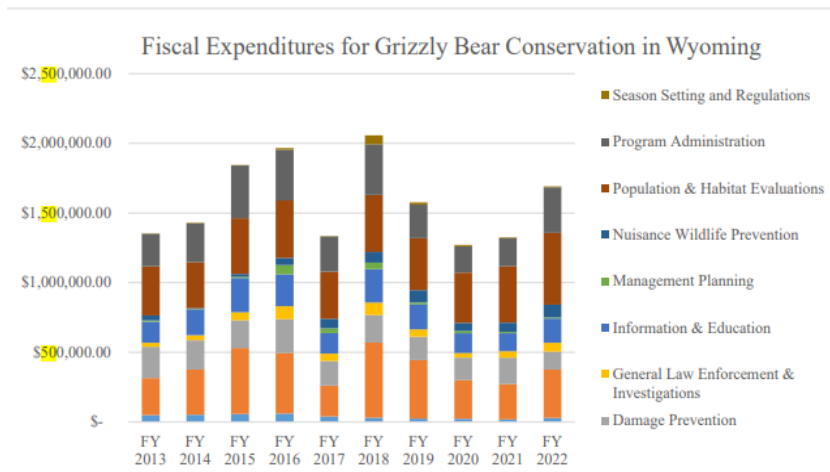


Figure 5: Wyoming Grizzly Bear Expenditures | Source: Wyoming Game and Fish Department Director Brian Nesvik

⁴¹ *Id.*

⁴² Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.

⁴³ 76 FR 234, See page 72456

⁴⁴ 87 FR 26152

spending over \$1 billion to implement the ESA.⁴⁵ This number is incomplete, as the report only considers 1,599 out of the 1,821 domestic species that were listed under the ESA at the time.⁴⁶

Also included in that report was the amount of money spent by states on the ESA, over \$121 million.⁴⁷ The dollar figure given for state expenditures is also incomplete, as only 26 states reported information to the USFWS. States that did not report data include those with many federal threatened and endangered species like California, Hawaii, and New Mexico.⁴⁸ As the WWF Subcommittee heard from Wyoming Game and Fish Department Director Brian Nesvik during a legislative hearing on ESA delisting bills in March 2023, states often take on an outsized burden when managing federally listed species. For example, the State of Wyoming has invested \$59 million over four decades (\$20 million in the last decade) to recover the Greater Yellowstone grizzly bear.⁴⁹

In addition to the administrative costs of ESA, critical habitat designations can have a substantial impact on the property value of private lands. Sam Hamilton, former USFWS Director, summed up the problem well stating, “If a rare metal is on my property, the value of my land goes up. But if a rare bird occupies the land, its value disappears.”⁵⁰ For example, the USFWS’ analysis of the 2006 critical habitat designation for the Alameda whipsnake estimated the negative economic impact on land development would be \$531 million over 20 years.⁵¹ Additional research has shown that critical habitat designations can reduce land values by as much as 70 percent.⁵²

Recovery of listed species, one of the stated goals of the ESA, also carries with it heavy costs. For example, the recovery plan for the Oregon spotted frog in the Deschutes River Valley of Eastern Oregon is projected to cost \$2.8 billion over the next 40 years.

Another species that has garnered significant attention in recent months is the North American Right Whale. NMFS published a recovery plan for the whale in 2005 that states, “the total estimated cost of recovery cannot be determined, as it will likely take numerous decades, and many management activities that are currently impossible to predict, to bring the species to a point at which the protections of the ESA are no longer warranted.”⁵³ On August 1, 2022, NMFS published a proposed rule that would institute a 10-knot speed restriction for boats over 35 feet in certain parts of the Atlantic coast.⁵⁴ Stakeholders contend this proposed rule would restrict access to the Atlantic, making boating and fishing trips unsafe and nearly impossible.⁵⁵ Stakeholders estimate that the economic impact of canceling boating and fishing trips as a result of the

⁴⁵ “Federal and State Endangered and Threatened Species Expenditures, Fiscal Year 2020.” U.S. Fish and Wildlife Service. [Federal and State Endangered and Threatened Species Expenditures Fiscal Year 2020 \(fws.gov\)](https://www.fws.gov/endangered/Endangered-and-Threatened-Species-Expenditures-Fiscal-Year-2020)

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ “Testimony of Brian R. Nesvik.” House Committee on Natural Resources. 3/23/23. [testimony_nesvik.pdf \(house.gov\)](https://www.house.gov/committees/natural-resources/committees-testimony-nesvik.pdf)

⁵⁰ *The Best Laid Plans*, 115 U.S. New and World Rep. 89 (1993)

⁵¹ [71 FR 58175](https://www.federalregister.gov/documents/2017/07/17/71-FR-58175)

⁵² “The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions.” Maximilian Auffhammer, et al. 96 Land Econ. 188, 206 (2020).

⁵³ “Recovery plan for the north Atlantic right whale (*Eubalaena glacialis*).” U.S. National Marine Fisheries Service. 2005. [Recovery plan for the north Atlantic right whale \(Eubalaena glacialis\) \(noaa.gov\)](https://www.noaa.gov/species-recovery-plans/north-atlantic-right-whale-eubalaena-glacialis)

⁵⁴ Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg. 46921-46936 (2022).

⁵⁵ Letter from Boating Industry, October 3, 2022. [Right Whale Rec Fishing and Boating Comment Letter 10-3-2022 Final.pdf \(nmma.org\)](https://www.nmma.org/Right-Whale-Rec-Fishing-and-Boating-Comment-Letter-10-3-2022-Final.pdf)

proposed rule could put 340,000 American jobs and nearly \$84 billion in economic contributions in jeopardy.⁵⁶

Litigation costs under the ESA also have a considerable impact on federal resources and negatively impact species recovery. According to a recent study by *E&E News*, of the 53 final ESA-related actions that were taken by the USFWS from January 1 to May 1, 2023, at least 38 (over 70 percent) of involved species had been the subject of lawsuits.⁵⁷ Lawsuits often come from serial environmental litigants and in many cases stem from missed statutory deadlines. For example, the ESA requires the USFWS and NMFS to respond to petitions to list species within certain timeframes, generally 90 days or one year, depending on the circumstance. It is common practice for activists to submit a high volume of petitions, including multiple species in a single petition. This tactic makes compliance with the statutory timelines difficult, if not impossible. The subsequent lawsuits distract agency resources from recovering species to having to defend agency actions. Jonathan Wood, vice president of law and policy at the Property and Environment Research Center, has stated: “Unfortunately, the law has created incentives to pursue litigation and conflict at the expense of collaborative and on-the-ground conservation efforts.”⁵⁸ Mr. Wood will be appearing as a witness during this hearing.

According to the Equal Access to Justice Act, prevailing parties in certain federal lawsuits can obtain attorney’s fee and costs.⁵⁹ In 2020 the Center for Biological Diversity (CBD) was awarded \$340,000 in attorneys’ fees paid by the federal government out of taxpayer funds after CBD prevailed in challenging the USFWS Biological Opinion for the Rosemont Copper Mine in Arizona.⁶⁰ This process has become known as the “sue and settle” system. As the WildEarth Guardians, a serial environmental litigant, puts it: “We could avoid having to fully litigate cases and use scarce resources to do so if the agency would agree to settle cases more.”⁶¹

ESA-related litigation could result in other substantial costs, like the removal of vital infrastructure. In the West, litigious groups often target hydroelectric dams under the belief that their removal will lead to the recovery of listed fish species, like salmon. The four lower Snake River dams in Washington, which are currently subject to litigation, show how costly removing vital infrastructure due to ESA-related litigation could be.

⁵⁶ Coastal Recreation, Economic Impacts to Coastal Communities. <https://www.coastalrecreation.org/about-the-issue/>

⁵⁷ “How the courthouse came to be a major habitat for the ESA.” Michael Doyle and Pamela King. *E&E News*. 6/20/23. [How the courthouse came to be a major habitat for the ESA - E&E News by POLITICO \(eenews.net\)](#)

⁵⁸ *Id.*

⁵⁹ [28 U.S.C. 2412](#)

⁶⁰ “How the courthouse came to be a major habitat for the ESA.” Michael Doyle and Pamela King. *E&E News*. 6/20/23. [How the courthouse came to be a major habitat for the ESA - E&E News by POLITICO \(eenews.net\)](#)

⁶¹ *Id.*

Total of \$744.5 million does not reflect \$108.6 million in obligations to capital projects for fish and wildlife projects, software development, and structures at dams, or \$90.6 million federal credits Bonneville receives from the U.S. Treasury

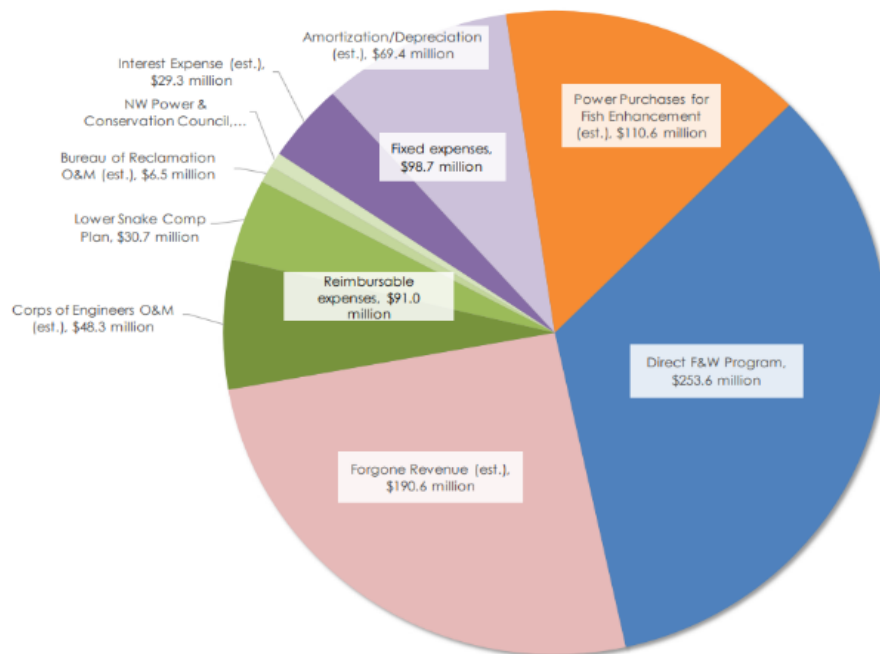


Figure 7: Cost by Major Area, FY2021 | Source: NW Council

In 2016, the Bonneville Power Administration (BPA) estimated that replacing the dams would increase power costs on their customers by \$274 million to \$372 million per year.⁶² Six years later, in 2022, BPA commissioned a study by the San Francisco environmental consulting firm Energy + Environmental Economics (E3) which says that the cost of replacing the output from these dams would range from \$415 million to \$860 million per year through 2045.⁶³ These costs do not take into account other benefits associated with the dams, including navigation, irrigation and flood control.

Another example of ESA-related costs in relation to the lower Snake River Dams is the existing BPA Fish and Wildlife Program that is financed by its ratepayers. This program was created to mitigate, protect, and enhance fish and wildlife populations and their habitat in the Columbia Basin.⁶⁴ The costs of this program include lost power generation caused by water spillage used for environmental purposes, power purchases to replace lost generation, and on-the-ground work including structural modifications at dams, habitat protection, research and fish hatcheries.⁶⁵ In Fiscal Year 2021 these costs were approximately \$744.5 million.⁶⁶ A significant amount of the

⁶² Bonneville Power Administration (2016). *A Northwest energy solution: Regional power benefits of the lower Snake River dams* [Brochure], at 2. <https://www.bpa.gov/-/media/Aep/about/publications/fact-sheets/fs-201603-A-Northwest-energy-solution-Regional-power-benefits-of-the-lower-Snake-River-dams.pdf>

⁶³ Energy + Environmental Economics. (2022) *BPA Lower Snake River Dams Power Replacement Study*. <https://www.bpa.gov/-/media/Aep/power/hydropower-data-studies/e3-bpa-lower-snake-river-dams-power-replacement-study.pdf>

⁶⁴ Bonneville Power Administration. *Fish & Wildlife Program*. <https://www.bpa.gov/environmental-initiatives/efw/fish-wildlife-program>.

⁶⁵ Northwest Power and Conservation Council. (2021). *2021 Columbia River Basin Fish and Wildlife Program Costs Report*. Northwest Power and Conservation Council, at 9. <https://www.nwcouncil.org/fs/17760/2022-1.pdf>

⁶⁶ Id.

program's costs are dedicated to salmon protections mandated under the ESA. These costs are passed on to BPA's electricity customers.

Fifty years in, it's clear that the ESA is in need of reform. At this hearing the Members will hear from witnesses who will speak to the harmful impacts the Biden administration roll backs of Trump-era reforms are having to species recovery, conservation, and how unjust costs are hurting Americans.