H.R. 520, H.R. 2990, H.R. 5103, H.R. 5504, H.R. 5509, H.R. 5874, AND H.R. 6008

LEGISLATIVE HEARING

BEFORE THE

SUBCOMMITTEE ON WATER, WILDLIFE AND FISHERIES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

Wednesday, October 25, 2023

Serial No. 118–73

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.govinfo.gov
or
Committee address: http://naturalresources.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE
53–922 PDF WASHINGTON : 2024

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Wednesday, October 25, 2023

U.S. House of Representatives

Subcommittee on Water, Wildlife and Fisheries

Committee on Natural Resources

Washington, DC

The Subcommittee met, pursuant to notice, at 3:05 p.m. in Room 1334, Longworth House Office Building, Hon. Cliff Bentz [Chairman of the Subcommittee] presiding.

Present: Representatives Bentz, McClintock, Graves, LaMalfa, Duarte, Hageman; Huffman, Peltola, Hoyle, and Porter.

Also present: Representatives Ciscomani, Newhouse; and Bonamici.

Mr. BENTZ. The Subcommittee on Water, Wildlife and Fisheries will come to order.

Good afternoon, everyone. I want to welcome Members, witnesses, and our guests in the audience to today's hearing.

Without objection, the Chair is authorized to declare a recess of the Subcommittee at any time.

Under Committee Rule 4(f), any oral opening statements are limited to the Chairman and the Ranking Member. I ask unanimous consent that all other Members' opening statements be made part of the hearing record if they are submitted in accordance with the Committee Rule 3(o).

Without objection, so ordered.

I also ask unanimous consent the gentleman from Washington, Mr. Newhouse; the gentleman from Florida, Mr. Donalds; and the gentleman from Arizona, Mr. Ciscomani be allowed to participate in today's hearing.

Without objection, so ordered.

We are here today to consider 7 legislative bills: H.R. 520, to amend the Endangered Species Act of 1973 to provide that artificially propagated animals shall be treated the same under the Act as naturally propagated animals, sponsored by Representative McClintock of California; H.R. 2990, the National Oceanic and Atmospheric Administration Sexual Harassment and Assault Prevention Improvements Act of 2023, sponsored by Representative Bonamici of Oregon; H.R. 5103, the FISHES Act, sponsored by Representative Donalds of Florida; H.R. 5504, to require the director of the United States Fish and Wildlife Service and Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration to withdraw proposed rules relating to the Endangered Species Act of 1973, and for other purposes, sponsored by Representative Newhouse of Washington; H.R. 5509, the Electronic Permitting Modernization Act, sponsored by Representative Porter of California; H.R. 5874, the TAAP Act, sponsored by Representative Ciscomani of Arizona; and H.R. 6008, the Requiring Integrity in Conservation Efforts Act, sponsored by Representative Graves of Louisiana, which was noticed as a discussion draft.

I now recognize myself for a 5 minute opening statement.

STATEMENT OF THE HON. CLIFF BENTZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. BENTZ. Today, we are meeting to discuss seven bills that address a variety of issues. Unsurprisingly, many of these bills highlight growing concerns that the Endangered Species Act, the ESA, will continue to be inflexible and unworkable. For example, H.R. 5504, sponsored by Congressman Newhouse, requires the withdrawal of the three proposed ESA rules relating to interagency cooperation and critical habitat designation, and the so-called blanket 4(d) rule issued by the Biden administration that consolidates power in the hands of the Administration and removes vital regulatory certainty for stakeholders.

As we will hear from our witnesses today, these rules increase conflict by continuing to focus on litigation-driven decisions, rather

than prioritizing work that focuses on the recovery of a species. Instead, the Biden administration should be working with Congress to modernize, streamline, and reform the ESA.

H.R. 520, sponsored by Congressman McClintock, would amend the ESA to require that artificially propagated species be treated as equivalent to naturally propagated species.

H.R. 5874, sponsored by Congressman Ciscomani, reauthorizes a program that provides state, Federal, and local officials with information to address pressing water resource challenges in the U.S.-Mexico border region.

H.R. 5103, sponsored by Congressman Donalds, addresses the delays at the Office of Management and Budget when reviewing and approving fishery disaster declarations.

Congressman Graves' legislation gives NOAA additional time to conduct studies and develop the best available science on Rice's whales, and to engage with the regulated community when it updates the biological opinion for the Gulf of Mexico Oil and Gas program.

I thank the Members for their work on these bills, and I thank the witnesses for testifying today.

I now recognize Ranking Member Huffman for his opening statement.

STATEMENT OF THE HON. JARED HUFFMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HUFFMAN. Thank you, Mr. Chairman. Good afternoon, and welcome to the witnesses who are with us.

Today's hearing covers seven bills, some of which are bipartisan, sound policies. But in the interest of time, I will focus on three of them that are not that.

I don't know about all of you, but I am experiencing some déjà vu in the Water, Wildlife and Fisheries Subcommittee today as we consider the latest bills from Team Extreme's extinction agenda, which we have been spending a lot of time on in this Congress. The three ESA-related bills we will hear about today pushed draconian, anti-science regulations that ignore climate change, protect oil and gas interests, and drive species closer to extinction. The common theme is that if the science isn't on your side, just interfere with it or ignore it.

H.R. 520 directs the National Marine Fisheries Service and the Fish and Wildlife Service to count artificially propagated animals the same as naturally born animals under the ESA. This would have dire consequences for endangered species recovery, ranging from salmon to corals to many listed species in between.

And some think that this bill might be a good idea to expedite species delisting. But let's not forget that delisting must consider the capacity of species to sustain themselves across a substantial portion of their range. Unless you can get salmon to build and operate their own hatcheries, that is just not going to work.

This bill does nothing to recover species in the wild, such as improving critical habitat. Instead, it makes it easier to destroy essential habitat by skewing the analysis used in biological opinions. Paradoxically, the bill could actually increase ESA protections for artificially propagated animals in some cases, leading to more

permitting requirements and paperwork for entities involved in conservation programs like zoos and aquariums. This bill is sloppy, shortsighted, unnecessary, and is not a serious public policy proposal.

Turning to H.R. 5504, we have yet another anti-science, pro-extinction bill. Instead of focusing on the future needs of wildlife, this legislates extinction, regressing ESA rules to the low standards rolled out during the Trump administration. This legislation blocks meaningful tribal consultation and public input, protecting pro-oil and gas interests who want to skirt environmental protection and keep us in the dark ages.

It is inappropriate for Congress to block any action on proposed rules and interfere with the process of establishing a yet-to-be-seen final rule. Let the agencies finish their work.

Finally, H.R. 6008 reads like a love letter to the oil and gas industry. The main villain is the critically endangered Rice's whale, a species with a population of about 50 individuals exclusively found in the Gulf of Mexico. If this species goes extinct, the blame rests squarely on American shoulders. Scientists are still actively studying Rice's whales, but we know without a doubt that oil and gas activities significantly impact them. It is estimated the Deepwater Horizon disaster wiped out 22 percent of the population, and ongoing and future oil and gas activities imminently threaten this species. The bill blocks any precautionary measures for oil and gas operations while the agencies conduct scientific analyses to better protect the few remaining Rice's whales.

The hypocrisy in this bill is astounding. This morning actually, we began marking up the BRIDGE Act, which exempts the next 10 Gulf of Mexico oil and gas leases from NEPA entirely. No basic levels of scrutiny, no public input for affected communities, no input from wildlife agencies on the possible impacts for marine life, nothing. But this bill today actively gives oil and gas stakeholders a special seat at the table in the rulemaking process for designating critical habitat and revising biological opinions. The hypocritical messaging couldn't be clearer.

When it comes to padding the pockets of oil and gas industry, scientific experts and frontline communities are silenced. But when it comes to the science and impact of an endangered whale, the oil and gas industry is handed a microphone, a megaphone. This bill is a slap in the face to conservation science. The decisions we make must be based on best available scientific and commercial data, not oil and gas profits. And this bill clearly, in the name of modernizing the ESA, would simply ignore science and let polluters write the rules.

That said, before we get started I would like to ask unanimous consent that Representative Suzanne Bonamici of Oregon have permission to join us on the dais and participate in the hearing to discuss H.R. 2990.

Mr. BENTZ. Without objection.

Mr. HUFFMAN. With that, I yield back.

Mr. BENTZ. I will now introduce our first panel. As is typical with legislative hearings, the bills' sponsors are recognized for 5 minutes each to discuss their bills.

I now recognize Representative Bonamici for 5 minutes.

STATEMENT OF THE HON. SUZANNE BONAMICI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Ms. BONAMICI. Thank you very much, Chairman Bentz and Ranking Member Huffman, for holding this legislative hearing and for inviting me to speak in support of H.R. 2990, the bipartisan NOAA Sexual Harassment and Assault Prevention Improvements Act.

Everyone deserves a safe and welcoming workplace. Many employees at the National Oceanic and Atmospheric Administration, NOAA, work in remote locations and aboard research and survey vessels, where they conduct cutting-edge scientific research.

A few years ago, I met a fisheries biologist who is very passionate about her work. She raised a serious issue. She and some of her colleagues had experienced sexual harassment while conducting research on a NOAA vessel ship and, after reporting the harassment, had been effectively grounded. Her research was derailed. She was told she could not be kept safe at sea. Her colleagues and her harasser knew that she had reported her experience, but at that time there seemed to be inadequate investigation into her case and others. This was and is unacceptable.

I contacted NOAA after hearing her story, and over the years I have been encouraged by changes in NOAA's policies and procedures. NOAA made it easier to report sexual harassment, required new training, and changed their investigation protocol.

In the years after NOAA completed the investigation into this biologist's case and she was able to return to sea and resume her research, I have spoken about this issue, Mr. Chairman and Mr. Ranking Member, with every NOAA administrator and acting administrator since Dr. Kathryn Sullivan.

And I do want to thank current NOAA Administrator Dr. Rick Spinrad, who happens to be an Oregonian, for his commitment to continue this work to keep every NOAA employee safe.

Although NOAA has taken steps to update their policies, we must do more to prevent harassment, help survivors seek justice, and hold harassers accountable for their action. My bipartisan bill would build on NOAA's progress by expanding coverage of NOAA's Sexual Harassment Prevention and Response Policy to include individuals who are employees of contractors who would not otherwise be covered. This change will close an important gap in protection.

My bill would also direct NOAA to provide a clear and secure structure for anonymous reports of sexual harassment. This would make it easier for survivors to identify safe reporting services without triggering an investigative process, unless the survivor requests it. Current law requires an investigation for all submitted reports of harassment.

This bill would also expand the information required in reports to Congress on sexual harassment and assault to include new covered employees and change of station or work location requests.

Importantly, this bill would empower NOAA's Office of Law Enforcement to enforce a prohibition on assault, intimidation, and interference with fisheries observers by removing restrictive stipulations that these acts need to be forcible in nature and occur on a vessel for NOAA to be able to investigate.

Mr. Chairman, NOAA has taken meaningful steps to protect its researchers and contractors. This bill will strengthen those efforts and make needed improvements to prevent harassment, modernize reporting, and hold harassers accountable to bring justice for survivors. Scientists and researchers need to be able to achieve the next generation of scientific advancements and discoveries without the fear of sexual harassment, sexual assault, or retaliation in the workplace.

I want to thank my co-leads on this legislation, Representatives González-Colón and Salazar.

Ranking Member Huffman, Chairman Bentz, and the Committee, thank you again for considering this important legislation. I yield back the balance of my time.

Mr. BENTZ. Thank you.

I now recognize Representative McClintock for 5 minutes.

STATEMENT OF THE HON. TOM MCCLINTOCK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MCCLINTOCK. Thank you, Mr. Chairman, thank you for holding a hearing today on H.R. 520.

Many years ago, when I was first elected to a district that included part of the Klamath Valley, I was introduced to the controversy involving the Klamath dams. The environmental left was attempting to tear down those dams, and it is finally succeeding. When I asked why, I was told of a catastrophic decline in the salmon population on the Klamath. I asked, well, how many are left? They said just a few hundred are left in the entire river. I said, well, that is terrible. Why doesn't somebody build a fish hatchery? Well, I soon learned that somebody did build a fish hatchery many years before.

The Iron Gate Fish Hatchery produces 5 million salmon smolts every year, with about 17,000 of them returning as fully grown adults to spawn in the Klamath. The problem is those adults aren't included in the population count. And to add insult to insanity, when they tear down the Iron Gate Dam, the Iron Gate Fish Hatchery goes with it, and then we will have a catastrophic decline in the salmon population.

And I then learned that, in most cases, the product of captive breeding programs are not allowed to be counted for purposes of the Endangered Species Act. The captive breeding operations such as fish hatcheries are often far cheaper and far more successful in propagating species than declaring vast swaths of land off limits for human activity. Indeed, captive breeding programs have been highly successful in bringing back species on the very brink of extinction, such as the California condor.

The simple reality is that the difference between a fish born in a hatchery and a fish born in the wild is the same difference as a baby born at a hospital or a baby born at home. Indeed, captive breeding programs can increase the genetic diversities of species that is at the very heart of the natural selection process that assures that a population is resilient under the changing conditions of nature.

So, this bill very simply says that captive breeding programs need to be recognized by the Endangered Species Act as legitimate

contributors to efforts to preserve the biodiversity and population of a species. Indeed, by recognizing this reality and by encouraging the use of captive breeding programs, I think we are better meeting the goals of the Endangered Species Act to assure that species in danger of extinction can be quickly and efficiently restored, and that the absurd distinctions that are about to decimate the salmon population on the Klamath that can be eliminated.

I yield back.

Mr. BENTZ. Thank you.

I now recognize Representative Newhouse for 5 minutes.

STATEMENT OF THE HON. DAN NEWHOUSE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. NEWHOUSE. Thank you, Chairman Bentz and Ranking Member Huffman, for the opportunity to testify in support of my bill, H.R. 5504, which would repeal three Biden administration regulations from the Fish and Wildlife Service and NOAA.

First, I would like to enter into the record a letter of support for my bill from the National Association of Homebuilders, and also thank them for their efforts on ESA reform.

In 2019, key changes to the Endangered Species Act were finalized by the previous administration that added more flexibility for affected stakeholders while also ensuring species recovery plans have a tailored and targeted approach. We have all known for a long time that the ESA is indeed in need of reform, and these changes were celebrated as they clarified and simplified how the ESA worked.

The first regulation that was changed was the elimination of the blanket rule under section 4(d) that automatically provided endangered-level protections to species that are only listed as threatened.

The second 2019 revision was in relation to critical habitat, and allowed the Fish and Wildlife Service and NOAA to research and share the economic impacts of a listing determination under the ESA, while providing flexibility in defining critical habitat, allowing the agencies leeway to only designate unoccupied areas as critical habitat if necessary.

The final change provided a more realistic and flexible approach by simplifying the interagency consultation process. They improved section 7 consultation established standards to ensure effect analysis of the proposed actions were only limited to activities that are reasonably certain to occur, taking away the leeway for agencies to assume the worst case scenarios for a species without clear and substantial information.

But this past June, the Biden administration proposed three rules to reverse all that I just described. My bill before us today would prevent the Administration from finalizing these proposals, and retain the previous administration's changes.

I have said it many times, but for far too long radical environmental activists have weaponized the ESA against farmers, ranchers, landowners, and rural communities while recovering less than 3 percent of species listed over the last 50 years. The proposed rule from Biden's Fish and Wildlife Service will encourage further

disruptions by activists, and make it even more difficult for true conservationists to assist with species recovery.

I believe we all have the same goal: to recover endangered species. We should not allow for this Administration or any administration or the agencies to continue to make it impossible to recover species and remove them from the list, especially at the detriment of those farmers, ranchers, and landowners.

As the Chairman of the Western Caucus, I am proud of this legislation, and I am happy to introduce it alongside the Chair of the Senate Western Caucus, Senator Lummis of Wyoming, to prevent these egregious rules from taking effect and to steer the ESA back to its intended purpose of helping species recover without being a barrier to prosperity for our rural communities.

Once again, thank you, Chairman Bentz, Ranking Member Huffman, for the opportunity to speak in support of my bill, and I yield back.

Mr. BENTZ. Thank you. I thank the Members for their testimony.

I will now introduce our panel: Mr. Gary Frazer, Assistant Director for Ecological Services with the U.S. Fish and Wildlife Service in Washington, DC; Mr. Tom Birmingham, Water Policy Expert in Sacramento, California; Dr. Sharon Megdal, Director of the Water Resources Research Center at University of Arizona in Tucson, Arizona; Dr. Barbara Taylor, the Red List Coordinator for the Cetacean Specialist Group with the International Union for Conservation of Nature in San Diego, California; Mr. Stephen Roady, Senior Lecturing Fellow and Professor of the Practice at Duke University in Washington, DC; Mr. Robert Beal, Executive Director of the Atlantic States Marine Fisheries Commission in Arlington, Virginia; Mr. Jonathan Wood, Vice President of Law and Policy at the Property and Environment Research Center in Bozeman, Montana; and Dr. Alex Loureiro, Scientific Director at EnerGeo Alliance in Houston, Texas.

I think we have just been joined by two Representatives.

Representative Porter, are you ready to go?

Ms. PORTER. I am ready. Let me just move over to where there is a microphone so that you can hear me. I am ready to go, sir, and I really appreciate it.

Mr. BENTZ. I now recognize Representative Porter for 5 minutes.

STATEMENT OF THE HON. KATIE PORTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. PORTER. Thank you very much, Chairman Bentz and Ranking Member Huffman, for selecting my bill to be part of this Subcommittee hearing.

I also want to thank Chairman Westerman and Ranking Member Grijalva, and both of their staffs for collaboration on this bipartisan bill.

Many of you may know that when one of my bills is in a legislative hearing in this Committee I like to print it on a poster board so that everybody can read it. And sadly, I wasn't able to trim this bill to one page. I got close, two pages, but I didn't dare try to hold up two poster boards at the same time, so no posters.

But I still think this bill is easy enough to grasp. After all, its topic, permitting reform, has been on our minds all year. Let's be

real. In this Committee, the permitting reform debate can get incredibly partisan and very heated. Republicans say they want it one way, Democrats say they want it the other way. But if we want to get anything done, we have to cut through that noise. We know that we can make our permitting reform process more efficient, and we can make progress if we can find just one area where everyone agrees.

Look no further than the bill that I wrote with my colleague from California, Congressman LaMalfa, the Electronic Permitting Modernization Act. This bill would task the Department of the Interior to offer an online option for as many of its permits as possible. Then it would require the Department to report back to us, to Congress, periodically on its progress toward electronic permitting.

Why does this matter? Because an online option for permits will reduce the amount of paperwork that gets mailed to our agencies and speed up processing times. We can improve permitting efficiency, which is what we all want without getting partisan.

At the same time, this bill will help Congress hold the Department of the Interior accountable for its work. We can applaud it when it is making progress, and we can hold it to account when it is coming up short. When the Department puts all of its permits in one place, we can more easily see which bureaus are getting things done here, with us, in the 21st century and which bureaus are still having workers sitting in windowless rooms, opening envelopes with paper checks and forms in triplicate.

But what matters most about this bill is that it improves the daily lives of the people we serve. Imagine you need a permit to reserve Federal land for an event. Would you want to dig through the websites of each of the bureaus of the Department of the Interior to try to find the right form, try to print it out, mail it in, and then hope that someday you hear back, or would you want to consult one single Department of the Interior webpage that links to all of the permitting platforms so that you can quickly find the right application and submit it online?

I will take the easy and efficient online way, please. And who wouldn't? Twenty-first century citizens deserve a 21st century Department of the Interior.

Now here is the big question: Is it possible for the Department of the Interior to build an efficient system like this? It is. And look no further for an example than an agency within the Department of the Interior itself, the U.S. Fish and Wildlife Service. This bureau has already brought over 80 different types of permits online. That is a government success story that we ought to be building upon. The Department of the Interior already has an exemplary bureau to use as a model. Now it needs to get things moving at its other bureaus. This bill pushes that process along, requiring the Department to create one webpage, and on that page link to the online permitting platforms and tell people how they can contact the appropriate bureau if they need help.

Look, I am a single mom with three kids. When your life is anything like mine, you just want things that you expect to be easy to actually be easy. Let's simplify people's lives just a little. Let's

show them that this part of their government, using their public lands, works efficiently.

I want to thank my colleague, Congressman LaMalfa, for his partnership on this bill to do just that. Let's continue in a bipartisan spirit. I urge all my colleagues to support the Electronic Permitting Modernization Act, and I look forward to this hearing and to eventually marking up this bill.

I yield back.

Mr. BENTZ. Thank you.

The Chair now recognizes Representative Ciscomani for 5 minutes.

STATEMENT OF THE HON. JUAN CISCOMANI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. CISCOMANI. Thank you, Chairman Bentz and Subcommittee members for allowing me to testify in support of my bill, H.R. 5874, the TAAP Act.

This bipartisan bill would authorize the incredibly important TAAP program for 10 additional years.

Originally authorized by the late Congressman Jim Kolbe, a good friend, a mentor of mine, and someone that held my seat here, the seat that I am in now, for 22 years earlier, from the late 1980s, 1990s, and even into the 2000s, Congressman Kolbe continues to be a standard of character for our community and also former Senator Jon Kyl, another good friend of mine, the TAAP Act facilitates groundwater studies between the U.S. Geological Service, University of Arizona, the University of New Mexico, Texas A&M, and several agencies in Mexico.

For Arizonans, water security is always top of mind. I always say that we made the 5th largest city in the desert, in the middle of the desert, and while we have made enormous strides in conserving our water resources, more work must be done to secure Arizona's water future.

I represent the 6th District of Arizona, which contains a significant part of the southern region of the state, including several border communities. Many of my constituents that I represent rely on pumped groundwater from transboundary aquifers for their drinking water, farming, and other everyday needs. Water managers in southwestern communities are faced with several unique challenges, one being the invisible nature of groundwater. Groundwater quality and quantity is much more difficult to measure than river water, as it is often far below the surface, making it hard to keep track of.

One of the top challenges in the Southwest is, several priority aquifers are shared with our neighboring state of Mexico, which creates even further complications. Mexico and the United States have different ways of managing our natural resources, and it can be difficult to come up with solutions that work for both communities, for both countries.

In order to make wise decisions, these folks need to know how much water is being depleted and recharged in the aquifers. That is why more research is needed to support these often rural and underserved communities. The more information they have

regarding their water supply, the better they will be to serve the water needs of their communities.

Since its conception, the TAAP program has made tremendous strides in expanding our understanding of our water resources and, consequently, has improved our water diplomacy efforts with Mexico. The participating researchers of the TAAP program have more important research in their works, which I look forward to hearing about today from our witnesses.

Dr. Megdal, thanks for the work being done through this program. The water users, managers, and policymakers alike can rest assured that they have accurate and detailed information about key transboundary aquifers in the Southwest.

As Arizonans, we know that water is our lifeline. This bill is critical in ensuring we have clean and abundant water for years to come.

Thank you again, Subcommittee members, for hearing my testimony today, and I look forward to seeing H.R. 5874 pass the full House Natural Resources Committee in a swift, bipartisan fashion.

Thank you, and I yield back.

Mr. BENTZ. Thank you, and I thank the Members for their testimony, and I thank the witnesses for their patience.

We will begin with Mr. Gary Frazer, Assistant Director for Ecological Services, the U.S. Fish and Wildlife Service in Washington, DC.

You are recognized, sir, for 5 minutes.

STATEMENT OF GARY FRAZER, ASSISTANT DIRECTOR FOR ECOLOGICAL SERVICES, U.S. FISH & WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. FRAZER. Good afternoon, Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee. Thank you for the opportunity to testify on bills related to the Endangered Species Act and electronic permitting systems.

The ESA is a cornerstone of the Service's conservation mission, and our implementation of the law centers around applying the best available science and adhering to our thorough rulemaking process. To effectively carry out our responsibilities under the ESA, we must have science-based, clear, and up-to-date implementing regulations.

To balance resource use and protection, the Service also issues a variety of permits under the laws we administer, and seeks to ensure that these permit forms and processes are easily accessible and navigable for the public we serve.

H.R. 520 would require that the Secretary not distinguish between naturally and artificially propagated animals in making any determinations under the ESA, as well as require the authorization of artificial propagation of animals for mitigation required under the ESA.

The intent of the ESA is to recover wild populations of species in their natural habitat whenever possible. Controlled propagation has long been an important recovery tool, but is not necessary or appropriate for every species, must be carefully managed to support the conservation of wild populations, and is not a substitute for addressing threats to the species.

Recovery is not simply a matter of numbers of individuals. Rather, recovery involves restoring healthy, secure, and self-sustaining populations of species in the wild. The Service already has the authority under the ESA to use controlled propagation as a recovery tool. We have an existing policy that addresses its role in the conservation and recovery of listed species, and we have used it in many circumstances when it is appropriate to do so.

However, the Service is concerned that H.R. 520 would have negative repercussions for species recovery. The bill would require the Secretary to treat wild and artificially propagated animals as equivalent for ESA determinations and mitigation, even when doing so may not be appropriate for the conservation of the species. The Service is also concerned that the bill would violate the United States implementation of CITES. For these reasons the Service opposes H.R. 520.

H.R. 5504 would require the withdrawal of proposed rules revising ESA implementing regulations for listing species and designating critical habitat, for carrying out interagency section 7 consultations, and for determining what protections apply to threatened species.

Mr. BENTZ. Excuse me, Mr. Frazer, if I can interrupt, if you could get closer to your mic, the mics in this room are notoriously bad. So, you are going to have to pretend you are with the Rolling Stones and you are singing to us.

[Laughter.]

Mr. FRAZER. Thank you, Mr. Chairman. I apologize.

H.R. 5504 would also prohibit the Service and National Marine Fisheries Service from finalizing, implementing, or enforcing these proposed rules. These proposed rules would provide important protections for species, strengthen and clarify consultation and listing processes, reaffirm the key role that science plays in decisions that guide the protection and recovery of endangered and threatened species, and align with the purposes of the ESA.

The Service opposes H.R. 5504. The ESA assigns to the Secretary the responsibility to develop implementing regulations. The Services are doing so following the best available science and the processes prescribed by the ESA in the Administrative Procedure Act, including public review and comment.

The Department supports H.R. 5509, which would direct the Secretary of the Interior to design and deliver electronic systems for permits, forms, and other required paperwork.

In Fiscal Year 2020, the Service began creating an electronic system called ePermits. Currently, ePermits has over 50,000 user accounts for over 80 different permit applications. At full capacity, the ePermits will provide an efficient, modern, and secure system that improves the permitting process for the public we serve.

H.R. 5509 would encourage further modernization while providing the flexibility necessary for the Service to work with different regulatory, statutory, and treaty requirements. It also allows the Department to evaluate best practices for protecting data, including those from tribes or businesses.

I appreciate the opportunity to testify before the Subcommittee today, and I would be pleased to answer any questions you may have.

[The prepared statement of Mr. Frazer follows:]

PREPARED STATEMENT OF GARY FRAZER, ASSISTANT DIRECTOR FOR ECOLOGICAL SERVICES, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

ON H.R. 520, H.R. 5504, AND H.R. 5509

Introduction

Good morning, Chairman Bentz, Ranking Member Huffman, and Members of the Subcommittee. I am Gary Frazer, Assistant Director for Ecological Services for the U.S. Fish and Wildlife Service (Service) within the Department of the Interior (Department). I appreciate the opportunity to testify before you today on two bills related to the Endangered Species Act (ESA) and one bill related to modernization of permitting systems within the Department.

The Service's mission is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. For more than 150 years, the Service has collaborated with partners across the country and around the world to carry out this mission.

Implementation of the ESA is a cornerstone of the Service's responsibilities in stewarding plants, fish, and wildlife. Through this law, Congress set a public policy to address the loss of biodiversity and prevent species extinctions. The ESA, which turns 50 this year, plays a pivotal role in protecting threatened and endangered species and their habitat, and in implementing wildlife conservation treaties including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Through CITES, the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish, wildlife, and plants facing extinction. A key component of the ESA is the protection and restoration of global biodiversity, which requires healthy wildlife and plant populations, living in the wild, that retain genetic diversity for long-term sustainability.

Central elements of the Service's implementation of the ESA, are (1) a reliance on, and prioritization of, the best available science; and (2) a careful adherence to our thorough rulemaking process. The Service, and other agencies responsible for carrying out the ESA, must have science-based, clear, and up-to-date implementing regulations. Day-to-day work related to interagency cooperation under Section 7 of the ESA, classification of species and designation of critical habitat under Section 4, and protection of threatened species under Section 4(d), are all underpinned and guided by our implementing regulations.

Alongside the conservation of threatened and endangered species in the U.S., the Service also works globally with partners to protect, restore and conserve all wildlife populations and their habitats in the face of increasing environmental challenges and human demand through development, outdoor recreation, and trade. To balance resource use and protection, the Service issues a multitude of wide-ranging permits under the laws we implement. Permits issued by the Service help facilitate important activities such as scientific research and the import of hunting trophies under CITES, and rehabilitation, education, and depredation under the Migratory Bird Treaty Act. Ensuring that these permits are easily accessible and navigable is essential for the Service's responsibility to the American people and to ensure compliant conservation actions are taken in a timely manner.

The Service appreciates the Subcommittee's interest in the ESA and electronic permitting. We offer the following comments on the three bills under consideration today and look forward to discussing our views with the Subcommittee.

H.R. 520, To amend the Endangered Species Act of 1973 to provide that artificially propagated animals shall be treated the same under that Act as naturally propagated animals, and for other purposes

H.R. 520 would amend Section 4 of the ESA to require that the Secretary of the Interior or the Secretary of Commerce (as appropriate) not distinguish between naturally and artificially propagated animals in making any determinations under the ESA. This would include determinations of threatened or endangered species status, as well as an array of other actions such as critical habitat designations or recovery plans. The bill would also amend Section 14 of the ESA to require the Secretaries to authorize the use of artificial propagation of animals for any mitigation required under the ESA regarding that species. The bill would make the amendments applicable to all endangered or threatened species listed before, on, or after the date of enactment of the legislation.

The Service opposes H.R. 520 and outlines several concerns with this legislation below.

The intent of the ESA is to recover wild populations of species in their natural habitat whenever possible. In well-managed circumstances, controlled propagation can support the recovery of some listed species and can be used to reverse declines and return listed species to suitable habitat in the wild. For example, genetically managed conservation breeding programs can be used for reintroductions of species into the wild (e.g., Species Survival Plan programs). However, controlled propagation is not necessary or appropriate for every species, must be carefully managed to support the conservation of wild populations, and is not a substitute for addressing the primary threats to the species. A species listing is based on primary threats described in a listing rule. Species recovery is not simply a matter of numbers of individuals, rather recovery is dependent upon fully addressing the threats for the long term, so that species are restored to ecological health.

Section 10(j) of the ESA allows the Service to establish experimental populations as a recovery tool and in July 2023, the Service revised these regulations to provide more flexibility to establish experimental populations outside of a species' historical range when important to address threats like climate change. The regulations outline requirements and considerations for establishing these populations using the best available science and could allow using species that were propagated in a genetically managed breeding program. In addition, the Service and the National Marine Fisheries Service (NMFS; collectively the Services) have an existing policy that addresses the role of controlled propagation in the conservation and recovery of species listed as endangered or threatened under the ESA (65 FR 56916). Including plant species, over 700 of the approximately 1,690 domestic species currently listed under the ESA have some kind of controlled propagation program. Given that the Service currently has the flexibility to use controlled propagation as a tool to aid in species recovery, H.R. 520 would not provide any additional benefit to species protected under the ESA but could have negative repercussions for species recovery.

H.R. 520 does not include definitions for several important terms and lacks clarifying language for implementation of the legislation. There are no definitions for the terms "animal" or "artificially propagated," so there is no distinction between breeding in captivity for conservation purposes and other forms of artificial or controlled propagation. Without a definition or clarifying language, there is no requirement that the breeding be for conservation and reintroduction or ensuring healthy and sustainable species genetics, which are important factors to ensuring benefits to wild populations. There is also no delineation of qualified entities to conduct the artificial propagation, or discussion of qualifications or licensing of the individuals conducting such work or maintaining such facilities, which risks improper breeding of species. Further, as written, this bill would allow animals cultivated in commercial breeding operations for commercial sale, including human consumption, to qualify as artificially propagated animals and be treated the same as naturally propagated animals. Commercially raised animals often are not behaviorally suitable for release into the wild, and often differ substantially from their wild counterparts due to selective pressures from humans and the captive environment. As such, artificially propagated animals should not be treated the same as naturally propagated animals in every circumstance under the ESA, as would be required under H.R. 520.

Additionally, H.R. 520 would violate the United States' implementation of CITES, which includes different requirements for captive-bred or artificially propagated versus wild specimens, as there is no clear distinction in the legislation that the requirements would apply only with regard to requirements for ESA-listed species and not affect the separate international requirements for CITES-listed species.

H.R. 520 could lead to impacts on the long-term health of wild and captive-bred animals. A lack of sound and appropriate management of controlled propagation of listed species presents many genetic and ecological risks and may be counter to recovery efforts. In most captive breeding programs, not all individual animals are suitable for release or breeding. Captive-bred animals can also become behaviorally adapted to captivity, and maladapted for survival and reproduction in the wild. In addition, wild animals and plants are often more resilient to climatic changes, such as drought, as compared to propagated animals and plants, and are better able to adapt to climate change, helping to preserve biodiversity long into the future. Genetic diversity and the potential for genetic bottlenecks is also a concern if controlled propagation is not conducted according to sound genetic management plans. The Services' controlled propagation policy addresses sound management of controlled propagation when it is recommended for recovery of listed species.

H.R. 520 may prevent the Service from implementing and applying its controlled propagation policy and use of best available science to ensure controlled propagation of listed species is soundly managed and consistent with the recovery and conservation needs of listed species.

While Section 1 of this legislation only directly amends Section 4 of the ESA, it would pertain to determinations in all sections of the ESA including Section 7 consultations and ESA permitting decisions. For example, the Services currently consider propagated animals in Section 7 consultations and, consistent with the ESA, the Services' consideration takes into account factors such as genetic diversity and suitability for release, as informed by the best scientific and commercial data available. As written, it appears H.R. 520 would preclude the Services from basing determinations on the best scientific and commercial data available.

Finally, the Service also has concerns regarding the requirement that the Secretary shall authorize the use of artificial propagation of animals of a species for purposes of any mitigation required under the ESA related to that species. The Service already has the authority to utilize artificially propagated animals for mitigation in circumstances where it is appropriate, and we do so when that is in the best interest of conservation of the species. That said, for most species, artificial or controlled propagation is not appropriate as mitigation as it does not directly address the species' conservation needs. For the vast majority of species, traditional mitigation approaches, such as habitat restoration and protection, are more effective and scientifically appropriate. Whether or not wild or artificially propagated animals are utilized should be based solely on the best available science.

While the Service opposes H.R. 520, we would welcome the opportunity to discuss the intent of the legislation and the Service's current use of controlled propagation to support species recovery in the wild with the sponsor and the Subcommittee.

H.R. 5504, To require the Director of the United States Fish and Wildlife Service and the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration to withdraw proposed rules relating to the Endangered Species Act of 1973

H.R. 5504 would require the Services to withdraw proposed rules revising regulations under Section 7 of the ESA on Interagency Cooperation (88 Fed. Reg. 40753) and Section 4 of the ESA on Listing Endangered and Threatened Species and Designating Critical Habitat (88 Fed. Reg. 40764). The legislation would also require the Service to withdraw the proposed rule revising regulations under Section 4(d) of the ESA Pertaining to Endangered and Threatened Wildlife and Plants (88 Fed. Reg. 40742). H.R. 5504 would prohibit the Services from taking any action to finalize, implement, or enforce these proposed rules.

The Service opposes H.R. 5504. The ESA assigns the Secretary the responsibility to develop regulations to implement this statute. The Services are doing so in this rulemaking process following the best available science, and the administrative processes prescribed by the ESA and the Administrative Procedure Act (APA), including public review and comment. The Service believes that this is the proper path for carrying out our statutory responsibility for implementing the ESA.

In January 2021, the President issued Executive Order 13990, which, in Section 2, required all executive departments and agencies to review Federal regulations and actions taken between January 20, 2017, and January 20, 2021. Subsequently, in June 2021, the Services announced a plan to improve and strengthen implementation of the ESA. This plan included tailored revisions to the regulations for listing species and designating critical habitat, and for interagency cooperation. It also included reinstating the option of applying the protections afforded to endangered species to species listed as threatened under the ESA ("blanket" 4(d) rule). In response to this Executive Order and in accordance with commitments made in response to litigation and a court-ordered remand, the Services have proposed revisions to the 2019 regulations.

On June 22, 2023, the Services proposed to revise two final rules that had been jointly issued in 2019 under Sections 7 and 4 of the ESA, and the Service proposed to reinstate the option to apply the protections afforded to endangered species to threatened species (also known as the "blanket 4(d) rule") under Section 4(d) of the ESA, which had been removed in 2019. In conducting our review and putting forward our proposed rules, the Services followed the core principles of science-based evaluation and public participation and comment as part of our rulemaking procedures.

The Services' proposed rule regarding Section 7 of the ESA would amend portions of the regulations under the 2019 final rule that govern interagency cooperation. Our review of the 2019 rule indicated that, while most of the changes finalized in that rule met the intent of clarifying and improving the consultation process, certain

revisions would be beneficial to further improve and clarify interagency consultation, while continuing to provide for the conservation of listed species.

The proposed Section 7 revisions to the 2019 final rule include clarifying the Service's responsibilities regarding reinitiation of consultation, clarifying the definitions "effects of the action" and "environmental baseline," and removal of Section 402.17 "Other Provisions" that was added in the 2019 final rule. These proposed revisions simplify the regulations and eliminate the need for any reader to consult multiple sections of the regulations to discern what is considered an "effect of the action." In addition, the proposed rule includes amendments to the regulatory provisions relating to the scope of reasonable and prudent measures in an incidental take statement to better reflect congressional intent and serve the conservation goals of the ESA. Minimizing impacts of incidental take on the species through the use of offsetting measures can result in improved conservation outcomes for species and may reduce the accumulation of adverse impacts, sometimes referred to as "death by a thousand cuts."

Ensuring Section 7 consultation regulations are clear and up to date is critical. Under Section 7 of the ESA, Federal agencies must consult with the Service or NMFS when any action the agency carries out, funds, or authorizes may affect a listed species or critical habitat. The purpose of the consultation is to ensure that any action Federal agencies carry out, fund, or authorize will not jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify their designated critical habitat. Since November 1, 2022, the Service has logged more than 87,000 requests for project reviews. Many of these requests were for Section 7 consultations for energy, infrastructure, and construction projects. The Service anticipates this workload will continue to rise with implementation of the Bipartisan Infrastructure Law and Inflation Reduction Act, and as our Nation's population, economy, and infrastructure needs continue to grow. The proposed rule will help ensure that Federal agency partners have greater clarity in their role in implementing the ESA through Section 7.

The Services' proposed rule regarding regulations under Section 4 would revise the 2019 final rule on listing species and designation of critical habitat. The proposed rule, published on June 22, 2023, would reinstate prior language affirming explicit Congressional direction that listing determinations are to be made "without reference to possible economic or other impacts of such determination". Decisions regarding classification determinations should be based solely on the best scientific and commercial data available as reflected in the language of the ESA, not possible economic or other impacts of listing, reclassifying, or delisting a species. The proposed rule would also revise the reasons for delisting by reinserting the word "recovered" to explicitly acknowledge that one of the fundamental goals of the ESA is to recover listed species. It would also revise the foreseeable future framework, revise the circumstances for when critical habitat designation may be not prudent, and revise the criteria for designation of unoccupied critical habitat. Revision of the critical habitat regulations will better prepare the Service and our partners to continue conserving species and their ecosystems as climatic conditions change.

The Service's proposed rule regarding regulations under Section 4(d) would reinstate the blanket 4(d) rules, which were withdrawn in 2019. The blanket 4(d) rules provide an option to extend most protections provided to endangered species to species listed as threatened, unless the agency adopts a species-specific 4(d) rule.

Reinstating the blanket 4(d) rule option, which was in place for more than 40 years prior to the 2019 withdrawal, will allow for a more efficient, straightforward, and transparent method to protect threatened species for which the Service finds the blanket rule protections are appropriate. It would also ensure there is never a lapse in threatened species protections. In situations where it is determined that the standard suite of Section 9 prohibitions, as well as several exceptions to those prohibitions, are appropriate for a threatened species, we would not need to develop any additional regulatory text to codify a species-specific 4(d) rule. If the proposed rule is finalized, the Service would still maintain the ability to issue species-specific 4(d) rules.

As a whole, these proposed rules provide important protections for species, strengthen consultation and listing processes, reaffirm the central role science plays in decisions that guide the protection and recovery of endangered and threatened species, and align with the conservation purposes and the statutory language of the ESA. In addition, the Services are carefully following the best available science, the rulemaking process outlined in the ESA, and the APA in promulgating these proposed rules.

H.R. 5509, Electronic Permitting Modernization Act

H.R. 5509, the Electronic Permitting Modernization Act, would direct the Secretary of the Interior to design and deliver electronic permitting systems for permits, forms, and other required paperwork, to the extent practicable. The Secretary would also be required to create a centralized repository with hyperlinks to all electronic permitting systems across the bureaus of the Department, and points of contact for customer service or technical assistance inquiries. Finally, H.R. 5509 would also require the Secretary to provide Congress with periodic updates on implementation. The Department supports H.R. 5509, which aligns with modernization efforts already underway across the Department.

As a federal agency, the Service is committed to continually improving our delivery of and access to services for the public. In Fiscal Year (FY) 2020, the Service began creating a centralized, electronic system for permits called ePermits. Since then, we have been incrementally improving the system and increasing its capacity. Currently, ePermits has over 50,000 user accounts for over 80 different permit application forms and feedback has been increasingly positive. Examples of permits currently available on ePermits include CITES permits, ESA incidental take permits, and Migratory Bird Treaty Act depredation permits. At full capacity, ePermits will provide an efficient, modern, and secure system that improves the permitting process for Service stakeholders. In addition, other bureaus within the Department also maintain electronic permitting systems. For example, the Bureau of Safety and Environmental Enforcement maintains two electronic systems for well permitting: eWell and Technical Information Management System (TIMS Web).

H.R. 5509 would encourage further progress on modernizing permits, while providing the flexibility necessary for the Service to work with different regulatory, statutory, and treaty requirements of permits. This flexibility is also important across the Department as these systems require specialized structures to transfer, store, and process large amounts of data. Importantly, by allowing the Secretary to operate these systems "to the extent practicable", H.R. 5509 allows the Department to evaluate best practices for protecting data, including data from Tribes and confidential business information that often have unique privacy protections and may need to be precluded from a centralized database or public release. Developing and maintaining these modern dynamic public-facing systems will require additional resources to increase agencies' capacities, especially as permit requirements are added or updated and as more users apply online. The Service is requesting $13.5 million in FY 2024 for ePermits to add new permits for the National Wildlife Refuge System and our Migratory Birds program, while improving the functionality of the system. We appreciate the sponsor's and the Subcommittee's efforts to work with the Service in ensuring that the modernization of electronic permitting systems is implementable and beneficial to the public.

Conclusion

The Service appreciates the Subcommittee's interest in the ESA and electronic permitting. With the flexibility provided by the ESA, the Service is using controlled propagation as a tool to aid in species recovery. We have also issued proposed rules to provide science-based, clear, and up-to-date implementing regulations for the ESA. Additionally, the Service is striving to make permitting easier and more accessible through electronic systems that will improve service delivery to the public. We would welcome the opportunity to discuss these efforts further with the Subcommittee.

QUESTIONS SUBMITTED FOR THE RECORD TO MR. GARY FRAZER, ASSISTANT DIRECTOR FOR ECOLOGICAL SERVICES, U.S. FISH AND WILDLIFE SERVICE

Mr. Frazer did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Questions Submitted by Representative Bentz

Question 1. What percentage of species listed under the ESA are improving?

Question 2. The Service has indicated plans to restore the "blanket 4(d) rule," that automatically regulates endangered species as if they were threatened. During this administration, the Service has so far listed 11 animal species as threatened. It could have extended endangered-level regulations to any of them. Instead, in every case, it

has rejected that approach because a tailored rule would be better for species conservation. Given this administration's consistent rejection of the blanket rule's approach, why is it moving forward with plans to restore the blanket rule?

Question 3. In the 2019 final rule to revise the regulations for Section 4 of the Endangered Species Act relating to listing of endangered and threatened species and designating critical habitat, the Fish and Wildlife Service and the National Marine Fisheries Service added more robust and detailed procedures for the designation of unoccupied areas as critical habitat. The 2023 proposed rule would largely remove those regulatory provisions. Along with the 2022 rescission of the definition of "habitat" that was finalized in 2020, with this proposed rule, it appears that the Services are opting for regulatory ambiguity and unconstrained discretion in deciding what areas qualify as critical habitat. Can you explain why the Services are proposing removal of these provisions?

Question 4. The courts have said that species are to be delisted when they no longer meet the definition of a threatened species or endangered species. The existing regulations use the word "shall" to reinforce this mandatory obligation. The 2023 proposed rule to revise the regulations implementing Section 4 of the Endangered Species Act relating to listing of endangered and threatened species and designating critical habitat would revise this to say that the regulatory criteria demonstrate when "it is appropriate to delist a species." Can you explain this change in position, which appears to diverge from what is required by statute?

Question 5. In the proposed rule to revise regulations for interagency cooperation under Section 7 of the Endangered Species Act published earlier this year, the Fish and Wildlife Service and the National Marine Fisheries Service are considering revisions to their long-standing interpretation of the scope of "reasonable and prudent measures." If this proposed language is finalized, instead of minimizing the impacts of incidental take, the Services could require that these impacts be fully offset. This change could impose significant additional costs on project proponents. Can you explain the legal basis/authority for this change since it appears contrary to the plain language of ESA Section 7(b)(4)(C)(ii)?

Question 6. The rulemaking making revisions related Section 7 of the ESA was issued days after a significant ruling from the U.S. Court of Appeals from the D.C. Circuit, Maine Lobstermen's Association v. National Marine Fisheries Service, No. 22-5238 (D.C. Cir. June 16, 2023).

Could you please clarify how this ruling may affect section 7 cons ltation, as well as other areas of ESA implementation, including in the development and issuance of a final rule?

Mr. BENTZ. Thank you.

The Chair recognizes Mr. Tom Birmingham, Water Policy Expert from Sacramento, California, for 5 minutes.

STATEMENT OF TOM BIRMINGHAM, WATER POLICY EXPERT, SACRAMENTO CALIFORNIA

Mr. BIRMINGHAM. Thank you, Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee.

I also would like to thank you for the opportunity to share my perspective on H.R. 520, an Act that would amend the Endangered Species Act to provide that artificially propagated species shall be treated the same under the Act as naturally propagated species.

There is no real dispute that the Endangered Species Act was enacted for laudable purposes, including the protection and conservation of endangered and threatened species. Conflict over the Act primarily revolves around how the Act is implemented, and how its implementation affects human activities including water resource management, agricultural production, forestry management, energy development, and commercial and recreational fishing. These conflicts have extended to how the Fish and Wildlife

Service and the National Marine Fisheries Service treat artificially propagated fish or wildlife under the Act.

Congress has expressed its policy choice that artificial propagation of a species is a legitimate means by which endangered or threatened species can be conserved. Section 3, subparagraph 3 of the Act defines conserving and conservation to mean the use of all methods and procedures which are necessary to bring a listed species to the point at which the measures provided in the Act are no longer necessary, including propagation. Experience has demonstrated, without artificial propagation, some species would likely have gone extinct.

Mr. McClintock mentioned the California condor. In 1982, there were only 22 condors that survived in the wild, and to avoid extinction, the Fish and Wildlife Service and other agencies initiated a capture and a captive breeding program. Five years later, all of the remaining wild condors were in captivity. As of today, the Fish and Wildlife Service reports that there are 300 wild, free-flying California condors that make up its population.

Another species that likely would have gone extinct but for artificial propagation is the Central Valley winter-run Chinook salmon. In 2014 and 2015, drought killed nearly the entire population of naturally propagated winter-run juvenile salmon in the Sacramento River. In response, the Fish and Wildlife Service and NOAA Fisheries and National Marine Fisheries Service initiated a captive broodstock program at the Livingston Stone National Fish Hatchery. In 2018 and 2019, the program released 220,000 and 185,000 juvenile winter-run Chinook salmon, respectively.

With respect to that program, the Assistant Administrator for NOAA Fisheries' Central California Office stated, "These fish continue to impress us with their resilience and their ability to survive, if given the opportunity, and we are fortunate to have the hatchery to help us save this species."

As members of the Subcommittee are aware, most decisions made under the Act are made without regard to the economic or other policy considerations. As the general manager of a water agency in the San Joaquin Valley, I had the opportunity to witness the socioeconomic impacts of water supply reductions resulting from futile attempts over decades to protect the Delta smelt. It now appears that the only means of protecting that species from extinction is through undertaking artificial propagation, which is currently being done by the Service in cooperation with the California Department of Fish and Wildlife.

But how the Service and NMFS treat artificially propagated fish under the Endangered Species Act varies from species to species. As outlined in my written testimony, many of the decisions are based on policy considerations that are articulated in various policy documents, but these documents represent policy choices. Enacting H.R. 520 would represent a congressional determination that such policy choices concerning how artificially propagated fish and wildlife should be treated under the Act should be made by Congress, rather than an administrative agency.

Moreover, this policy choice has the potential to facilitate the conservation and recovery of listed species while providing balance to the implementation of the Act.

Again, I appreciate the opportunity to express my perspective on H.R. 520, and I would welcome the opportunity to respond to questions from members of the Subcommittee.

[The prepared statement of Mr. Birmingham follows:]

PREPARED STATEMENT OF THOMAS W. BIRMINGHAM, WATER POLICY EXPERT, SACRAMENTO, CALIFORNIA

ON H.R. 520

Chairman Bentz and members of the Subcommittee, my name is Thomas Birmingham, and I am resident of Sacramento, California. In December 2022, I retired as the general manager of the Westlands Water District, a position I held for more than twenty-two years. At various times, I also served as general counsel for the District. Prior to my employment with Westlands I was in private law practice, with an emphasis on water law. I am honored to have been invited to testify at today's legislative hearing on H.R. 520, a bill that would amend the Endangered Species Act of 1973 to provide that artificially propagated individuals of a species of fish or wildlife shall be treated under that Act as equivalent to naturally propagated individuals.

I hope everyone would agree, the Endangered Species Act was enacted for laudable purposes including to protect and conserve endangered and threatened species and the ecosystems upon which they depend. Conflict over the Act primarily revolves around how the Act is implemented and how its implementation affects human activities, including water resources management, agricultural production, forestry management, energy development, and commercial and recreational fishing. These conflicts include how agencies responsible for implementing the Act treat artificially propagated animals.

Congress has already expressed its policy choice that artificial propagation of a species is a legitimate means by which an endangered or threatened species can be conserved. Indeed, section 3(3) of the Act defines the terms "conserve", "conserving", and "conservation" to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided in the Act are no longer necessary, including "propagation." 16 U.S.C. § 1532(3).

Experience has demonstrated that without artificial propagation, some species likely would have gone extinct. The most notable example is the California condor, which was listed in 1967 as endangered under the Endangered Species Preservation Act of 1966, the predecessor to the Endangered Species Act of 1973. According to the U.S. Fish and Wildlife Service ("FWS"), by 1982, only 22 condors survived in the wild, and in an effort to avoid extinction of the species, FWS began to capture the remaining wild condors. Five years later, all remaining wild condors were in captivity and a captive breeding program to save the species was undertaken. FWS reports that today, the total wild free-flying California condor population is more than 300 birds. https://fws.gov/program/california-condor-recovery.

Another species for which captive breeding, or artificial propagation, was a critical tool to avoid extinction is the Central Valley winter-run Chinook salmon. According to the FWS, drought in 2014 and 2015 killed nearly the entire in-river winter-run juvenile salmon population, which prompted FWS, along with the National Marine Fishery Service ("NMFS"), to reinitiate a captive broodstock program at the Livingston Stone National Fish Hatchery, part of the Coleman National Fish Hatchery Complex. In 2018 and 2019, that program released 220,000 and 185,000 juvenile winter-run Chinook salmon, respectively. https://www.fws.gov/story/2021-08/reclaiming-lost-population. With respect to this program, Maria Rea, then Assistant Regional Administrator for NOAA Fisheries' California Central Valley Office, stated "[t]hese fish continue to impress us with their resilience and their ability to survive if given the opportunity," and "[w]e were fortunate to have the hatchery to help us save this species. . . ." https://www.fisheries.noaa.gov/feature-story/endangered-winter-run-chinook-salmon-increase-millions-offspring-headed-sea.

I am confident that all the members of the Subcommittee are aware that most decisions made under the Act are made without regard to economic or other policy considerations. As the general manager of a public water agency in the San Joaquin Valley that is dependent on a federal reclamation project for its water supply, I witnessed the socioeconomic impacts of water supply reductions resulting from futile attempts over decades to protect from extinction the Delta smelt. It now appears that the only hope to conserve this species is artificial propagation, which is now

being undertaken by the FWS, in cooperation with the California Department of Fish and Wildlife.

But how artificially propagated fish are treated under the Endangered Species Act varies from species to species. For instances, spring-run Chinook salmon from the Feather River Hatchery Spring-run Chinook Program are treated as part of the Central Valley spring-run Evolutionary Significant Unit ("ESU"), but fish from numerous hatcheries are excluded from Lower Columbia River Chinook salmon ESU. 50 CFR § 223.102. The determination of whether to treat hatchery fish the same under that Act as naturally propagated fish is based on numerous policy considerations set forth in a rule published by NMFS entitled "Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead." 70 Fed. Reg. 37204.

This Policy on the Consideration of Hatchery-Origin Fish was developed after the Court's decision in *Alsea Valley Alliance v. Evans*, 161 F. Supp.2d 1154 (D. Or. 2001), appeal dismissed, which set aside NMFS's 1998 listing of Oregon Coast coho salmon because it impermissibly excluded hatchery fish from the ESU listing. Prior to the Court's decision in *Alsea Valley Alliance*, NMFS recognized that artificial propagation could be used as a conservation tool and had the potential to help speed recovery of natural populations, but NMFS did not explicitly consider the contribution of hatchery fish to the overall viability of an ESU, or whether the presence of hatchery fish within the ESU might have the potential for reducing the risk of extinction of the ESU or the likelihood that the ESU would become endangered in the foreseeable future. 70 Fed. Reg. 37205.

The Policy on the Consideration of Hatchery-Origin Fish was intended to provide policy guidance to NMFS personnel for considering how hatchery-origin fish would be treated under the Endangered Species Act. And despite including artificially propagated fish within an ESU listing, conservation and recovery efforts are often almost exclusively focused on naturally propagated individuals.

The enactment of H.R. 520 would represent a congressional determination that such policy choices should be made by Congress, rather than an administrative agency. Moreover, this policy choice has the potential to facilitate the conservation and recovery of listed species, while providing balance to avoid often draconian impacts resulting from implementation of the Endangered Species Act. I would welcome any questions from members of the Subcommittee.

Mr. BENTZ. Thank you. The Chair recognizes Dr. Sharon Megdal, Director of the Water Resources Research Center at the University of Arizona, Tucson.

Dr. Megdal, you are recognized for 5 minutes.

STATEMENT OF SHARON B. MEGDAL, DIRECTOR, WATER RESOURCES RESEARCH CENTER, UNIVERSITY OF ARIZONA, TUCSON, ARIZONA

Dr. MEGDAL. Thank you, Mr. Chairman, Ranking Member, members of the Subcommittee, and Representative Ciscomani. I appreciate the opportunity to provide input on H.R. 5874, and I thank Representative Ciscomani and co-sponsor, Representative Stansbury, for introducing this bill to reauthorize the United States-Mexico Transboundary Aquifers Assessment Program, and modify a restriction on the ability to study additional transboundary aquifers along the border shared by Arizona and the Mexican state of Sonora.

Like all over the country and world, water security and reliability are critical concerns along our shared border with Mexico, where groundwater is a particularly important water source for many communities, and the only water source for some. Characterizing groundwater conditions and aquifer properties enables communities along the border to better understand their water supply conditions and implications of their water utilization.

Assessments enable more informed decision-making by water users, water managers, and policymakers at multiple levels.

The original legislation authorizing the TAAP, as we call it, Transboundary Aquifer Assessment Program, became law in late 2006. It authorized the Secretary of the Interior, through the U.S. Geological Survey, USGS, to collaborate with the states of Arizona, New Mexico, and Texas, the country of Mexico, and others to characterize priority transboundary aquifers. The TAAP has focused thus far on the four priority aquifers specified in Public Law 109-448, and I provided you in my written testimony a map that shows where those aquifers are located along the border.

Given the program's focus on internationally-shared aquifers, the International Boundary and Water Commission, or IBWC, has played a key coordination role for the efforts that are carried out binationally. The IBWC issued a joint report that has established the cooperative framework that has guided the collaborative binational efforts to date. Teams have been working on meeting program objectives through many investigations, reports, presentations, and dialogues.

And I brought with me today, one copy, it is very heavy, I am going to leave it with Representative Ciscomani, a study that was completed in 2016, the binational study of the Transboundary San Pedro Aquifer, a very important river aquifer system for Arizona. And what is notable about this, aside from the fact that it contains beautiful maps and useful information that has been harmonized across the two countries, is that it is fully bilingual. If you turn it over, it is fully in Spanish, and it is really a first of its kind.

The process of collaboration that went into putting that together made for seamless transition to working on the binational study for the Santa Cruz Aquifer, our second priority aquifer in Arizona, and that is expected to be done soon.

We also work very hard on trying to make this an understandable program for people. So, we also have this 6-page brochure, also fully bilingual, that we have produced, and I have brought copies for all of the Committee members to have of that. And I referenced that in my written testimony.

Assessments are performed aquifer by aquifer, or community by community because the hydrologic geologic recharge and other conditions vary. Groundwater is actually a very local resource. These collaborative work efforts continue.

The USGS and the Water Resource Research Institutes from my university, the one I direct, New Mexico State University, and Texas A&M University have developed a 5-year strategic program for going forward, and it focuses on things including stakeholder engagement and capacity building, looking at the socioeconomic context, putting together accessible and hydrologic studies.

These proposed amendments do two things. They would enable us to continue this program going forward, and they enable Arizona to have the flexibility to add priority aquifers, which the current version of the law does not have, but the states of New Mexico and Texas can add those. So, this amendment would modify that to restrict only a small portion of the border, instead of the entire border along Arizona.

As someone who has worked on this program since its inception, I can tell you reauthorization will reinvigorate and reinforce the robust efforts to bolster water security.

Thank you for the opportunity to testify today.

[The prepared statement of Dr. Megdal follows:]

PREPARED STATEMENT OF SHARON B. MEGDAL, PH.D., DIRECTOR, WATER RESOURCES RESEARCH CENTER, A COOPERATIVE EXTENSION CENTER; FACULTY MEMBER, DEPARTMENT OF ENVIRONMENTAL SCIENCE AND COOPERATIVE EXTENSION, THE UNIVERSITY OF ARIZONA

ON H.R. 5874

Mr. Chairman, Members of the Subcommittee, and Representative Ciscomani, thank you for the opportunity to provide input on H.R. 5874, which would amend the United States-Mexico Transboundary Aquifer Assessment Act (Act). I thank Representative Ciscomani and co-sponsor Representative Stansbury for introducing this Bill to reauthorize the United States-Mexico transboundary aquifer assessment program and modify a restriction on the ability to study additional transboundary aquifers along the border shared by Arizona and the Mexican state of Sonora.

Background

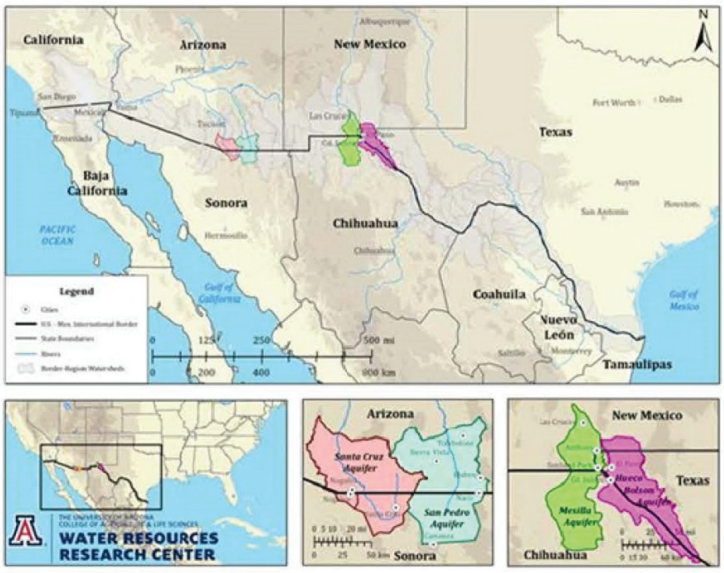
Like elsewhere in the Southwest—and the Nation—water security and reliability are critical concerns along the border shared by the United States and Mexico. Along the border, groundwater is a particularly important source of water for many communities, and it is the only source for some. Due to its invisibility, assessment of groundwater quantity and quality are needed. Characterizing groundwater conditions and aquifer properties will enable communities along the border to understand their water supply conditions and the implications of their water utilization. Assessments enable more informed decision making by water users, water managers, and policy makers at multiple levels.

The original legislation authorizing the Transboundary Aquifer Assessment Program, codified as P.L. 109-448, became law in late 2006. It authorized the Secretary of the Interior, through the U.S. Geologic Survey (USGS), to collaborate with the states of Arizona, New Mexico and Texas, the country of Mexico, and others to characterize priority transboundary aquifers. The Act established a partnership between the USGS and the federally authorized water resources research institutes per the Water Resources Research Act of 1964, as amended, for the participating states. The University of Arizona Water Resources Research Center, for which I serve as Director, is the federally authorized water institute for Arizona, with the New Mexico Water Resources Research Institute at New Mexico State University and the Texas Water Resources Institute at Texas A&M University being the other two participating university partners. I had the honor or providing testimony at the May 2006 House hearing on the original authorization, H.R. 469 at the time, and I have been involved in implementing the program ever since its approval. This testimony reflects this involvement, along with perspectives gained from my professional academic and non-academic work on groundwater policy and management that extends beyond 30 years.

Aquifers contain the groundwater on which many communities across the country depend. Because groundwater is not visible or accessible like river water, assessments are necessary to characterize the water quantity and quality of the resource, including the rate at which groundwater is being depleted and recharged. Many communities along our shared border with Mexico rely on groundwater. Current research has established that close to 30 aquifers along this border can be considered transboundary. The national frameworks of the United States and Mexico for managing groundwater are quite different. How states and communities within the United States manage groundwater varies considerably. The Transboundary Aquifer Assessment Program authorized by P.L. 109-448 has enabled collaborative research on groundwater and the aquifers that hold it, along with binational dialogue, which has contributed considerably to developing a common understanding of this critically important water resource. With sound, verifiable information in hand, water users, water managers, and policy makers are better equipped to make decisions to support the long-term viability of their economies and communities along the border.

An Overview of Transboundary Aquifer Assessment Program Efforts to Date

The Transboundary Aquifer Assessment Program has focused on the four priority aquifers specified in P.L. 109-448, which are shown on the map below. The map can be accessed at https://webapps.usgs.gov/taap/index.html.



Given the program's focus on internationally shared aquifers, the International Boundary and Water Commission (IBWC) has played a key coordination role for efforts carried out binationally. The IBWC is the binational body responsible for implementing the 1944 Water Treaty for the "Utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande." It is the key diplomatic mechanism for working on water matters along the border. The IBWC's 2009 three-page "Joint Report of the Principal Engineers Regarding the Joint Cooperative Process United States-Mexico for the Transboundary Aquifer Assessment Program" established the binational cooperative framework that has guided the collaborative binational efforts to date. The six Principles of Agreement are as follows. 1. Activities described under this agreement should be beneficial to both countries. 2. Aquifers to be jointly studied, as well as the scope of the studies or activities to be done on each aquifer, should be agreed upon within the framework of the IBWC. 3. The activities should respect the legal framework and jurisdictional requirements of each country. 4. No provisions set forth in this agreement will limit what either country can do independently in its own territory. 5. Nothing in this agreement may contravene what has been stipulated in the Boundary and Water Treaties between the two countries. 6. The information generated from these projects is solely for the purpose of expanding knowledge of the aquifers and should not be used by one country to require that the other country modify its water management and use.

The USGS website on the Transboundary Aquifer Assessment Program (TAAP) (https://webapps.usgs.gov/taap/index.html) provides information about TAAP studies and products, many of which have been carried out on the US side of the transboundary aquifers. The USGS site lists these key TAAP objectives:

- Develop binational information and shared databases on groundwater quantity and quality;
- Identify and delineate transboundary aquifers of importance;
- Develop binational criteria for determination of priority transboundary aquifers;

- Assess the extent, availability, and movement of water in transboundary aquifers and the interaction with surface water;
- Develop and improve groundwater-flow information for binational aquifers to facilitate water-resource assessment and planning;
- Analyze trends in groundwater quality, including salinity and nutrients;
- Apply new data, models, and information to evaluate strategies to protect water quality and enhance supplies; and
- Provide useful information to decision makers, including assessments of groundwater management institutions and policies.

Teams have been working on meeting these objectives through many investigations, reports, presentations, and dialogues. A noteworthy dialogue extending across the border region was the 2019 border groundwater summit convened by IBWC. Ongoing dialogue has been fostered by meetings of technical project teams and less formal dialogues, such as the Permanent Forum of Binational Waters (https://www.binationalwaters.org/), which includes significant coverage of groundwater.

One of the earlier binational reports is the 2011 report, Hydrogeological Activities in the Conejos-Medanos/Mesilla Basin Aquifer, Chihuahua, Phase I, which was facilitated by IBWC. The 2016 Binational Study of the Transboundary San Pedro Aquifer ("San Pedro report") was co-produced by the International Boundary and Water Commission, USGS, the University of Arizona, the University of Sonora, and CONAGUA (Mexico's National Water Agency). Along with the 2011 study, this first fully bilingual, binational study of a transboundary aquifer can be accessed online at the USGS TAAP website.

The San Pedro report includes compilation of much existing information and harmonization of maps to provide visual representation of the data and information. Instead of having maps that end on the respective national borders, which had been the case, this report includes binational maps that show the nature of the aquifer system that spans the border. All information, including maps, went through careful review by U.S. and Mexican experts and is published in both English and Spanish. While much of the content is highly technical, the importance of groundwater to supporting the economies of the border communities is underscored in the report's concluding section. A six-page, bilingual bulletin on the San Pedro report (appended to this Testimony) demonstrates efforts to present the information to broad audiences. The report and bulletin can be accessed at https://wrrc.arizona.edu/programs/taap-transboundary-aquifer-assessment—program/taap-official-binational-reports.

The process of developing the binationally endorsed San Pedro study involved constant interactions of the binational technical team. The mutually respectful approach enabled seamless transition to the development of a similarly structured binational report for the transboundary Santa Cruz aquifer system, which is nearing completion. The Santa Cruz aquifer system provides the groundwater for the "Ambos Nogales" region, an important border region for transportation of produce from Mexico to the United States and other products. Nogales, Sonora, which is much larger in population than Nogales, Arizona, is home to many maquiladora factories. The Arizona TAAP team has developed a water balance modeling framework and performed a series of water balance analyses, which show decline in groundwater levels and over-drafting of the aquifers. The modeling approach can be used to study impact of various water management decisions.

These and additional studies of the aquifers that support population and economic centers along the border, such as the El Paso-Ciudad Juarez area, increase understanding of the uncertainties associated with changing precipitation patterns and increased pumping. They contribute to more informed water management decisions. However, additional transboundary assessment, particularly groundwater modeling, is needed. In some areas, no modeling has been done. In other regions, updated, binationally developed numerical models would provide more accurate representation of the implications of pumping and recharge on groundwater supplies.

Assessments are performed aquifer-by-aquifer or community-by-community because the hydrologic, geologic, recharge, and other conditions vary by aquifer. Groundwater is withdrawn to support municipal, industrial and agricultural uses, and groundwater supports natural riparian systems. Groundwater extraction is often occurring at rates that exceed naturally occurring recharge. Recharge rates are dependent on a host of factors, including the connected surface water flows, which themselves involve significant variability.

Many TAAP products can be found at https://webapps.usgs.gov/taap/products.html. Published in 2023, the book version of the special issue of the journal Water entitled "Advances in Transboundary Aquifer Assessment," which was guest edited by USGS scientist Dr. Anne-Marie Matherne and me, includes several recent

TAAP-funded analyses. The free PDF version of the book can be accessed at https://www.mdpi.com/books/book/7794. Most publications are freely accessed. The University of Arizona Water Resources Research Center maintains websites that catalog reports and publications in English (https://wrrc.arizona.edu/programs/taap—transboundary-aquifer-assessment-program) and Spanish (https://wrrc.arizona.edu/programs/programa-de-evaluacion-de-acuiferos-transfronterizos-taap). New Mexico State University's TAAP activities and products can be accessed at https://taap.nmwrri.nmsu.edu/. Texas A&M has a transboundary water portal, from which information about TAAP can be found. See https://transboundary.tamu.edu/taap/. Additional references can be provided on request.

Through Fiscal Year 2023, a total of $10 million has been appropriated for the Transboundary Aquifer Assessment Program. The authorizing legislation specified that 50% of any appropriated funding remains with the USGS, with the other 50% distributed to the participating Water Resources Research Institutes, though the legislation does not specify how the funding is distributed across the states. According to my records, funding has occurred as shown in the table below. The University of Arizona Water Resources Research Center has received one-sixth of the amounts noted below.

Federal TAAP Appropriations through FY2023	
FY2008	$ ~500,000
FY2009	$ 500,000
FY2010	$ 1,000,000
FY2016	$ 1,000,000
FY2017	$ 1,000,000
FY2018	$ 1,000,000
FY2019	$ 1,000,000
FY2020	$ 1,000,000
FY2021	$ 1,000,000
FY2022	$ 1,000,000
FY2023	$ 1,000,000
TOTAL	$ 10,000,000

The collaborative work continues. The USGS and the Water Resources Research Institutes have prioritized five over-arching tasks for the five-year period beginning with Fiscal Year 2023:

1. Stakeholder Engagement and Capacity Building
2. Socio-Economic Context, Governance, and Policy [Note: Although USGS does not preform research related to water policy, personnel at the partner universities do engage in policy analyses.]
3. Binational Groundwater Atlas: Data Management, Mapping, and Visualization
4. Aquifer prioritization and vulnerability assessment
5. Hydrologic Studies to Understand Water Availability Challenges Facing Transboundary Aquifers—Stressors from Population, Industry, Agriculture, Drought, and Climate Variability

The extent to which each is accomplished will depend on funding availability. The U.S. team is actively engaged in discussions with Mexico regarding their participation, particularly with Atlas preparation and hydrologic modeling and data compilation. The five-year plan notes that substantial time and effort are required for binational reports. Fortunately, the international relationships are good and the framework for cooperation has been established. Some of the international work of TAAP team members has been to underscore the strong binational water cooperation we have at our country's southern border. Although cross-border work requires substantial time, the partners can build upon past experiences with carrying out multi-agency reviews and translation of reports to identify opportunities to stream-

line these processes going forward. There is commitment to work together across the USGS and the university-based water institutes and across the international border.

The Proposed Amendments included in H.R. 5874

Although the Transboundary Aquifer Assessment Program has accomplished a lot with the funding made available, there is still much work to be done. The partnerships established through TAAP have provided a very strong foundation for additional work. The processes and collaborations are in place for continuing and expanding these efforts.

In addition to the extension of the authorization period, H.R. 5874 includes a provision to enable the designation of additional priority aquifers along the Arizona-Sonora border. The original law envisioned the specification of additional priority aquifers along New Mexico's and Texas' border regions. However, in 2006, some water entities wanted to keep the very western, Colorado River portion of Arizona's border region outside of the Transboundary Aquifer Assessment Program. Between the time of the May 2006 hearing and the final passage of the legislation, language prohibiting designation of any additional priority aquifers along the Arizona-Sonora border was added. Section 2 (a) of H.R. 5874 would refine that prohibition by limiting it to the "Yuma groundwater basin designated by the order of the Director of the Arizona Department of Water Resources dated June 21, 1984". This change would enable other transboundary aquifers along the border, except the Yuma groundwater basin, to be eligible for study as part of the Transboundary Aquifer Assessment Program.

As someone who has worked on this program since its inception, I can attest to the productive collaboration of all involved to provide needed analyses and insights. Reauthorization will reinvigorate and reinforce the robust effort to bolster water security for our border communities and economies.

Thank you, Mr. Chairman, Members of the Committee, and Representative Ciscomani, for the opportunity to present this testimony.

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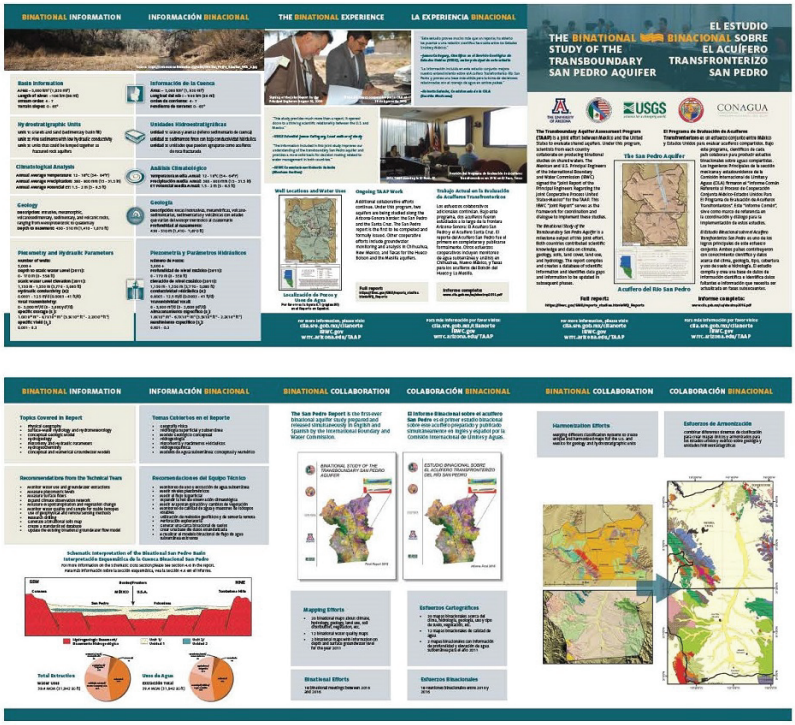
Screenshots of the six-page bulletin on the Binational Study of the Transboundary San Pedro Aquifer



QUESTIONS SUBMITTED FOR THE RECORD TO SHARON B. MEGDAL, PH.D., DIRECTOR, UNIVERSITY OF ARIZONA WATER RESOURCES RESEARCH CENTER

Questions Submitted by Representative Ciscomani

Question 1. You have worked on groundwater issues at the local, regional, national and international levels, could you please speak to the nature of the work you have done in this space and the key findings you have made in your career as it pertains to groundwater management?

Answer. Groundwater has been central to my work since the early 1990s, when I served as Executive Director of the regional Santa Cruz Valley Water District, which was based in Tucson, Arizona. It was during that period that I became involved in groundwater recharge, sometimes referred to as managed aquifer recharge. The district developed a recharge project in partnership with a local irrigation district and developed an augmentation plan. Later in the 1990s, I served as a water resources consultant to Pima County (AZ) and others. My work included multiple collaborative efforts to recharge surface water delivered through the Central Arizona Project and effluent. As a consultant, I worked on studies, financing plans, and permit applications. Since 2002, when I joined the staff of the University of Arizona Water Resources Research Center, I have worked on many groundwater management issues, including examination of differences across states in how they manage and regulate groundwater quantity and quality. My groundwater-focused, university-based research, education, and Extension work was supplement over a 12-year period during which I served on the popularly elected, volunteer board of directors for the Central Arizona Project (2009–2020). Throughout my two six-year terms, I was a member of the Central Arizona Groundwater Replenishment District

and Underground Storage Committee. I served as committee chair for five years. Groundwater is the source of over 40% of water used in Arizona, with many Arizonans 100 percent dependent on groundwater.

My local, regional, and state-wide efforts expanded nationally with some state surveys we conducted on water quantity and water quality governance and management. Due to our nation's decentralized approach to groundwater governance and management, there is significant variation in state frameworks. We sought to characterize similarities and differences in approaches and challenges across the United States. My work took on more international dimensions after the authorization of the Transboundary Aquifer Assessment Program (TAAP) and the binational aquifer assessment efforts with Mexico began. I have been part of global dialogues to raise the visibility of groundwater as a key water source, regularly pointing to our regional and border groundwater-focused efforts. Along with TAAP work, which focuses on characterizing transboundary aquifer systems and groundwater conditions, I have continued to work on managed aquifer recharge, which is playing a more important role than community-driven and user-driven water management. My comparative analyses include water management in water-scarce, growing regions. Unlike many who work on groundwater, I am not a hydrologist. Rather, I focus on groundwater policy and management. Through my writings, lectures, and teaching, I endeavor to make things understandable so that individuals of varying backgrounds can draw from the practices I have analyzed. My work is catalogued in my CV, which can be accessed from this page: https://wrrc.arizona.edu/person/sharon-b-megdal. A perusal of my publications and presentations will demonstrate the depth, breadth, and real-world relevance of my groundwater work.

Key findings and contributions of my work include:

- Managed aquifer recharge is an important tool for furthering achievement of water management goals, especially in arid to semi-arid regions.
- Arizona's regulatory framework for aquifer recharge is exemplary and can serve as a model for other jurisdictions.
- Efforts to characterize aquifers and groundwater conditions can assist communities and water users to better manage their groundwater resources.
- Functioning cooperative processes for working across borders and communities are crucial to identifying pathways to solutions to water challenges.
- Water users, including individual consumers, value learning more about where their water comes from, especially when they cannot see the source, as is the case with groundwater.

Question 2. The existing TAAP program has several different participants, both in the Southwest and Mexico, can you elaborate on how all the different participants play a role in the collection, analysis and presentation of the information they find on the water in transboundary aquifers? Why would it be beneficial for H.R. 5874 to reauthorize this program?

Answer. I am pleased to report that TAAP's collaborative efforts are strong. On the U.S. side, the Transboundary Aquifer Assessment Act (P.L. 109-448) authorized the Secretary of the Interior to establish a transboundary aquifer assessment program, with the U.S. Geological Survey (USGS) being the lead implementing agency. Section 4.a of P.L. 109-448 included this language regarding the establishment of the program:

> *(a) IN GENERAL.—The Secretary, in consultation and cooperation with the Participating States, the water resources research institutes . . . and the IBWC, as appropriate, shall carry out the United States-Mexico transboundary aquifer assessment program to characterize, map, and model priority transboundary aquifers along the United States-Mexico border at a level of detail determined to be appropriate for the particular aquifer.*

Because IBWC historical involvement in groundwater assessment had been limited to that associated with implementing Minute 242 to the 1944 Water Treaty, the role of IBWC (International Boundary and Water Commission) was not clear back in 2006. However, discussions subsequent to the late-2006 passage of P.L. 109-448 quickly clarified that establishing a binational assessment program required IBWC involvement due to the Mexican section's role in all binational waters, including groundwater. The facilitating role that began with the development and adoption of the 2009 Principal Engineers' Report continues to this day. While each country can assess aquifers on their respective sides of the border, binational collaborative efforts necessitate IBWC involvement.

USGS serves as the federal implementing agency for the United States. Along with engaging in assessment efforts, USGS manages the flow of funding to the participating federally authorized water resources research institutes. The process occurs through an annual proposal and budgeting process, with budgeted amounts dependent on federal appropriations. For Mexico, Mexico's national water commission, CONAGUA, is involved. For the Arizona-Sonora assessment efforts, University of Sonora experts have participated. Other federal and state agencies, along with Mexican university experts, have engaged. NGO representatives and state and local entities have engaged as well. Over TAAP's history to date, funding has been at times intermittent and not necessarily synchronized across the two federal governments. Nevertheless, coordination on binational efforts along the Arizona-Sonora border has continued with little interruption. In addition to completion of the *Binational Study of the Transboundary San Pedro Aquifer*, team member representing the five entities whose logos are on the cover of the San Pedro study (IBWC, USGS, University of Arizona, CONAGUA, and University of Sonora) have continued working on a similar study for the transboundary Santa Cruz Aquifer. More will be said about these collaborative efforts in my response to Question 3.

Binationally completed efforts to date have included compiling and harmonizing existing data, but the data are sometimes associated with out-of-date modeling or measurements. New investigations have been undertaken, including water balance modeling conducted by members of the University of Arizona team. The binational cooperative efforts to date have been limited to the four priority aquifers specified in P.L. 109-448. There are many more aquifers along the border, and additional assessment efforts are needed for the four priority aquifers.

Reauthorization will signal federal recognition that the transboundary aquifer assessment program is needed to assist border communities in developing a common understanding of their aquifer and groundwater quantity and quality, which will feed into more informed groundwater management decision making. In addition to the technical studies, reauthorization will enable the partners to work together to share the information broadly on both sides of the border, always in recognition of the roles of national, state, and local jurisdictions and water users. Reauthorization will signal recognition that groundwater, which is invisible, is a critical water resource. The reauthorization language includes a provision enabling specification of additional priority aquifers along the Arizona-Sonora border, except for the Arizona Department of Water Resources designated Yuma Basin. This modification to the original authorizing language is critical to enabling assessment of additional transboundary aquifers by program partners to serve more communities along the Arizona-Sonora border.

Question 3. What would you say has been the greatest accomplishment made by the TAAP program to date, and what projects do you think will be most impactful for border communities moving forward should the program be reauthorized.

Answer. Of course, I am proud of all of TAAP's contributions to understanding the aquifer and groundwater conditions. I am proud of the multi-faceted efforts, including the binational mapping that is very important to visualizing the data. I am proud that our efforts led to binational approval of the first binational and fully bilingual aquifer study, the *Binational Study of the Transboundary San Pedro Aquifer*. If I must single out the greatest accomplishment to date, I will point to the establishment of the binational partnerships and processes to carry out the program effectively. These partnerships, which enabled completion of the San Pedro study, provide the strong foundation exists for future efforts. Excellent working relationships exist across agencies, across experts, and across borders. The outputs are evidence of this. Additionally, I point to an article by Callegary et al., which explains the value of the collaborative processes (https://doi.org/10.1016/j.ejrh.2018.08.002). My international observations and interactions indicate that cooperative relationships cannot be taken for granted; they can be difficult to accomplish. Binational partnerships are critical to binational work plan development and implementation and lead to acceptance of assessment results by the affected individual and entities. It is sometimes said that imitation is the greatest form of flattery. The partners working on transboundary aquifers elsewhere along the border have recognized the benefits of developing the strong working partnerships and processes. H.R. 5874 will enable more support for border communities and their efforts to understand and manage their groundwater resources. I will conclude as I concluded my written testimony by stating that reauthorization will reinvigorate and reinforce the robust effort to bolster water security for our border communities and economies.

Thank you for the opportunity to respond to these questions.

Mr. BENTZ. Thank you.

The Chair now recognizes Dr. Barbara Taylor, the Red List Coordinator for the Cetacean Group, a specialist group with the International Union for the Conservation of Nature in San Diego, California.

You are recognized for 5 minutes.

STATEMENT OF DR. BARBARA TAYLOR, RED LIST COORDINATOR FOR THE CETACEAN SPECIALIST GROUP, INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE, SAN DIEGO, CALIFORNIA

Dr. TAYLOR. Thank you, Chairman Bentz and Ranking Member Huffman, for inviting me to testify at this hearing.

I have been working with marine mammals threatened with extinction for 43 years, and coordinate assessing the risk of extinction for whales, dolphins, and porpoises for the IUCN Red List.

The bill drafted by Representative Graves and considered here today would result in delaying conservation actions for the most endangered large whale in the world, Rice's whale, a whale that, as far as we know, is currently found entirely in U.S. waters.

The best available science demonstrates that there are only about 50 individuals now alive in the Gulf of Mexico, which is the lowest abundance for a species of large whale ever recorded. Today, I present evidence that delaying actions for a species with extremely small numbers is dangerous. The best available science is consistent with the presence of this species in the western, central, and eastern, northern Gulf of Mexico, and oil industry activities are serious threats to the species.

I have witnessed extinction. In 2006, we searched for the last Yangtze River dolphins to take them into lakes until threats could be removed from their natural river habitat. We failed to find any. The collapse happened much faster than anticipated. Once the Yangtze River dolphin became extinct, Mexico's vaquita porpoise became the world's most endangered marine mammal. It too declined very quickly, losing half of the species each year over the last decade. Now, only a few handfuls remain.

Journalists often ask me the depressing question, "If vaquita go extinct, who is next?" The next most endangered marine mammal species in the world is Rice's whale. And without protection, it is likely to be the next to go extinct.

I served on the team of scientists that assessed the status of these whales when they were petitioned for ESA listing. Three maps shaped my pictures of threats to these whales: records of their historical distribution, locations of oil and gas platforms, and tracks of shipping. Areas with historical records indicating suitable habitat now had oil and gas platforms instead of whales. Heavy volumes of ship traffic went right through the shelf break habitat historically favored by these whales. The possibility for ships to strike them was obvious.

The review concluded that many of the activities routinely associated with offshore energy development pose serious or severe threats to these whales.

Five years of study to obtain more evidence on the whales' habitat and distribution followed. Acoustics offered the best method for

recording distribution for rare marine mammals. Acoustic studies published in peer-reviewed scientific journals have visually validated and characterized calls made only by Rice's whales. Five acoustic recorders were placed for a year along the shelf break from Texas to Florida, and the western-most recorder detected Rice's whales multiple days in every season throughout the year.

Research has also shown the whales' primary prey is distributed in the same shelf break habitat across the northern Gulf.

There is no scientific reason to delay conservation actions because more data are needed to delineate Rice's whales distribution. Evidence from tagged whales show that they rest near the surface at night, making them vulnerable to ship strikes. The one known ship strike death exceeds allowable human-caused mortality, according to the Marine Mammal Protection Act. The actual number of deaths is likely to be far higher, given that few carcasses of offshore whales are found on beaches. Various models found that the oil industry accounted for over 30 percent of strike risk from all vessels.

The proposed bill and requiring additional assessments far beyond the accepted process of scientific peer review would significantly delay any new measures to address these threats. Gathering evidence on extremely rare species is a time-consuming process, time the species may not have.

It is both a privilege and a burden to host the only large whale species found as far as is known within the waters of a single nation. It is a privilege because the Gulf of Mexico must be a very special place to have its very own large whale species. It is a burden because such a species is naturally vulnerable and requires special protections.

Now that Rice's whales number only around 50 individuals, those protections must be prompt and adequate to avoid the fate of the Yangtze River dolphin and the likely fate of vaquitas. Neither China nor Mexico have the strong environmental legislation and rule of law that the United States has been a world leader in implementing. It would be a mistake to weaken or delay the protections this country has established in the ESA. Doing so risks causing the first human-driven extinction of a large whale.

Thank you for this opportunity to testify.

[The prepared statement of Dr. Taylor follows:]

PREPARED STATEMENT OF DR. BARBARA TAYLOR, INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE (IUCN)
RED LIST COORDINATOR FOR THE CETACEAN SPECIALIST GROUP

ON H.R. 6008

Thank you Chairman Bentz, and Ranking Member Huffman for inviting me to testify at this hearing, and particularly on the draft bill sponsored by Representative Graves titled "To prohibit the implementation of certain documents until the Assistant Administrator for Fisheries of the National Marine Fisheries Service issues documents relating to the Rice's whale."

I have been working with marine mammals threatened with extinction for 43 years. I led the largest marine mammal genetics unit in the world during my 30 years with NOAA's Southwest Fisheries Science Center. I've been the International Union for the Conservation of Nature (IUCN) Red List Coordinator responsible for assessing the risk of extinction for the world's cetaceans (whales, dolphins and porpoises) for 15 years, which gives me a unique overview on the threats facing these special animals.

The bill drafted by Representative Graves and considered here today would result in delaying conservation actions for the most endangered large whale in the world, Rice's whale, a whale that, as far as we know, is currently found entirely in U.S. waters. The best available science demonstrates that there are only about 50 individuals now alive in the Gulf of Mexico (Garrison et al. 2020), which is the lowest abundance for a species of large whale ever recorded.

My testimony today presents evidence on the following: 1) delaying actions for species with extremely small numbers is dangerous, 2) Rice's whale are a legitimate and critically endangered species, 3) the best available science is consistent with presence of this species in the western, central and eastern northern Gulf of Mexico, and 4) ship strikes, oils spills and seismic airgun noise, effects associated with offshore oil and gas development, are serious threats to the species.

My long experience with endangered marine mammals includes being witness to extinction. In 2006 I led one of two vessels surveying the Yangtze River to locate the last of the Yangtze River Dolphins. If we had been successful, our short-term goal was to take those dolphins into protected lakes until threats could be removed from their natural river habitat. We failed to find any. The last dolphin of the 30-million-year-old species had perished when no one was looking. The collapse happened much faster than anticipated. Witnessing extinction is a soul-crushing experience.

Once the Yangtze River Dolphin became extinct, Mexico's vaquita porpoise had the dubious distinction of being the world's most endangered marine mammal. By 2006 I had already researched vaquitas for 15 years, and I and my fellow Mexican conservation scientists immediately published an article entitled, "Saving the vaquita: Immediate action, not more data" (Jaramillo-Legorreta et al. 2007). Actions to eliminate the only threat to this species, entanglement in gillnets, still have not happened. The sad story of this species is that it too declined very quickly, losing half of its abundance each year over about the last decade. Now only a few handfuls remain.

Journalists often ask me the depressing question "If vaquita go extinct, who's next?" The next most endangered marine mammal species in the world is Rice's whale, and, without protection, it is likely to be the next to go extinct.

Rice's whale, vaquitas and Yangtze River dolphins are all classically vulnerable species: their distribution is small; consequently, their numbers are relatively few, and most importantly their entire distribution is under threats against which they have no natural defenses. One is extinct, one perilously close to extinction and the other, Rice's whale, is at such low numbers that each individual is important for the species' survival. It is the only large whale that, as far as we know, is currently found only in our country's waters.

Rice's whales are listed as "Critically Endangered" on the IUCN Red List because the species is in critical condition. I often use medical analogies because everyone understands the idea of critical condition for someone admitted to the emergency room. Imagine a patient brought to the emergency room who is losing enough blood that their life could be lost quickly if blood flow is not stopped. The doctor would not delay dealing with the known need to stop the bleeding because they wanted to know about other potential health issues. Delay actually causes harm to the patient. Similarly, with dwindling species, actions must be prompt to give the species the best chance to avoid extinction. If you know of threats that have killed whales or significantly threaten their survival, those threats must be addressed as efficiently as possible.

When NOAA is petitioned to list a species under the Endangered Species Act (ESA) a team of scientists is assembled to review the best available science. I have served on many of those teams and was asked, in 2014, to serve on the team evaluating Rice's whale, which was then referred to as the Bryde's whale in the Gulf Mexico. At the time, the evidence to describe these animals as a new species was still being assembled. Nevertheless, it was clear that these whales met the definition of animals deserving the protection of the ESA.

I had not previously done work in the Gulf of Mexico. Records from whalers showed a baleen whale that was found along the shelf-break in the northern Gulf primarily south of Louisiana and in similar depths in the southern Gulf, in Mexican waters (Reeves et al. 2011). Between 2009 and 2015, most sightings were in waters off Mississippi and Florida with no sightings south of Louisiana.

Two maps were highly influential in shaping my picture of threats to these whales. In our Status Review (Rosel et al. 2016), Figure 9B shows oil and gas platforms as of September 2014. The overlap between the whalers' locations south of Louisiana and the oil and gas platforms was startling to me because whales were no longer being seen in their historical range in areas covered with oil and gas platforms. Figure 17 in our Review shows the density of all northern GOM vessel traffic

in October 2009–2010, with the highest shipping traffic in yellow and red. This figure was equally startling, and worrying, because it revealed that heavy volumes of ship traffic went right through the shelf-break habitat historically favored by these whales. In fact, the volume was so heavy that it looked like blow torches shooting off the coasts of Louisiana and Texas and into whale habitat. The possibility for ships to strike these whales was obvious.

The Status Review contains tables of the team's rating of threats according to both severity and certainty given the best available scientific evidence. The greatest risk was oil spills and spill response, with unanimous agreement that this was a risk with high severity and nearly unanimous agreement that certainty about the threat was high. Other threats deemed to be nearly as severe were 'energy exploration and development', 'vessel collision', 'seismic surveys', 'stochastic and catastrophic events' and 'the small population size itself', which I'll talk more about in a moment.

The team's work was published in 2016 (Rosel et al. 2016), but the species was not listed until 2019. The Status Review and the ESA listing process prompted a five-year study by NOAA and its research partners, including Scripps Institution of Oceanography and Florida International University, to obtain more evidence on the whale's habitat and distribution.

Before discussing that research, I'd like to discuss how the status review team dealt with the question of whether these whales were a species, a subspecies or a Distinct Population Segment. Describing new subspecies and species is an active field for whales, dolphins and porpoises. Most species are described using collections of adult male skulls. You could go to the Smithsonian and pull drawers out full of grizzly bear skulls or American bald eagle skulls, but you couldn't pull out a drawer of whale skulls. Nor would the public tolerate going out and collecting such skulls. Fortunately, we can now use genetics to understand how whales in different oceans differ from one another.

Genetics research on these whales began in the early 2000s and by 2004 data were sufficient to suspect that Rice's whales differed significantly from other baleen whales. By the time of the Deepwater Horizon, Rosel and Wilcox had assembled DNA samples from more than 40% of the entire known population of Rice's whales. They compared these samples to the DNA of whale species in the Atlantic Ocean and around the world (Rosel and Wilcox 2014). Results confirmed they were very, very different from the species that they look most similar to, a pantropical species called Bryde's whale. In fact, it is so different that it is just as closely related to the Sei whale, a larger whale outweighing Rice's whale by about 40%. The Status Review Team asked the Society of Marine Mammalogy's Taxonomy Committee, which maintains the official list of marine mammal species, "Are Bryde's whales in the Gulf of Mexico likely to belong to at least an undescribed subspecies of what is currently recognized as *Balaenoptera edeni*?" In this context, 'at least' means that the evidence available in 2014 could mean that these whales were either an undescribed subspecies or a full species. This independent group of experts in cetacean taxonomy unanimously answered, 'Yes'. Since then, Rosel et al. (2021) published the full description as a species using both genetic and morphological data. That Rice's whale is a species has now been fully accepted by the Society of Marine Mammalogy's Taxonomy Committee.

The five-year study that ran from 2016 to 2021 focused on determining the extent, and characteristics, of the whale's habitat. One reason Rice's whale is little known is because it is distributed in deeper offshore waters, feeding near the bottom during the day and spending most of its time near the surface to rest at night, when visibility is low. Rare marine mammals, like vaquitas and Rice's whales, are difficult to study both because they are rare and because visual surveys are costly and consequently are done over short time-periods. Because marine mammals vocalize to find food and each other, acoustics are a very useful tool for detecting them, and recording devices can gather data in particular areas for months instead of the hours or days allowed by large-vessel surveys. Thus, for rare animals, acoustics offer the best method for recording distribution.

Acoustic studies, published in peer-reviewed scientific journals, have visually validated and characterized three calls made only by Rice's whales and no other whale species (Soldevilla et al. 2022a see also Rice et al. 2014). Five passive acoustic recorders were placed for a year along the shelf break from Texas to the middle of the known core habitat (Soldevilla et al. 2022b). The recorder south of Louisiana, the area with the most historical locations from whaling records, had no detections. However, the other recorders had detections, with the westernmost, which was south of Texas, recording Rice's whales multiple days in every season throughout the year. But the calls differ from those made in the eastern portion of the species' range. Such different calls are not consistent with vagrant whales from the east

wandering into western waters. More data often improve management as knowledge gaps are filled. This is just such a case and while additional work may expand the known area of Rice's whale distribution, such data will not contradict the work that has been published by some of the marine mammal field's best acousticians.

Research has also shown the whales' primary prey is distributed throughout the northern Gulf (Kiszka et al. 2023). Rice's whale is a selective predator, focused on aggregations of certain high-energy content fish—primarily a schooling fish known as *Ariomma bondi*. Both historical catch records and near-bottom trawling data shows *A. bondi* favoring the same shelf-break habitat throughout the northern Gulf of Mexico where the whales have been shown to persistently occur.

There is no scientific reason to delay conservation actions because more data are needed to delineate Rice's whale distribution.

As I have stated, our Status Review of the species identified and assessed potential threats to the whale and concluded that some threats were serious or of high severity. Vessel collisions, a threat for many large whales that use habitat in high shipping areas, represent one such threat. Evidence from tags show that the whales spend 85 to 88 percent of the time at night, when they are largely resting, and about 70 percent of the time overall, close to the surface, leaving them highly vulnerable to vessel strikes (Soldevilla et al. 2017, Kok et al. 2023). In 2009, a lactating female Rice's whale was killed by ship strike, and photo-identification efforts have documented one other Rice's whale with severe disfigurement to the tail stock, likely the result of a vessel strike (Rosel et al. 2021). The northern Gulf of Mexico experiences considerable vessel traffic, particularly in the north-central and western regions where oil and gas exploration and development are concentrated (Rosel et al. 2016). NMFS' 2020 analysis, set forth in its Biological Opinion on oil and gas activities, found that the industry accounted for about 34% of strike risk from all vessels and about 23.5% of strike risk from vessels traveling at speeds greater than 10 knots. An analysis updating NMFS' calculations with the new density estimates for Rice's whale (Litz et al. 2022) found the industry's contribution to be about 39.5% from all vessels and 32% from vessels traveling at speeds greater than 10 knots (Best et al. unpublished).

I was one of four NOAA scientists given the agency's Gold Medal for designing the management scheme for the number of animals that could incidentally be killed by human activities each year and still meet management objectives. This management was part of the Marine Mammal Protection Act's (MMPA) 1994 amendments. The current allowable kill for Rice's whale is 0.07 whales per year, or 1 whale every 14 years. There has been 1 documented death due to ship-strike in the last 14 years. However, it has been estimated that only a small percentage of dead whales are found, so it is likely that ship-strikes alone are more than would be allowed under the MMPA as human-caused mortality. Williams et al. (2011) estimated that only 3.4% of dead sperm whales in the Gulf of Mexico are found as carcasses. This number should be similar to the similarly large and offshore Rice's whale.

In addition to industrial activities posing ship-strike threats to Rice's whales in the central and western Gulf, industrial operations input noise into the whale's habitat. Noise was also characterized by the five acoustic recorders previously mentioned and was found to be higher in the central and western Gulf locations, where Rice's whale are currently found at lower densities, than in the quieter eastern core habitat (Soldevilla et al. 2022b). Sound is a fundamental sense used by whales to survive. Whales find their food and each other acoustically. Chronic noise is a serious detriment to Rice's whales' ability to thrive and recover.

A large proportion of the remaining Rice's whales were estimated to have been affected by the Deepwater Horizon oil spill and clean up[1] (Deepwater Horizon Damage Assessment Trustees 2016). Many smaller oil spills have occurred since, and spills remain a threat. To save Rice's whale from extinction, defining critical habitat and maintaining areas where spill threats are minimized is critical. Delaying consideration of Rice's whales' safety by delaying 'implementation of certain documents' specified in this bill increases the risk of extinction for the species.

The proposed bill, in requiring additional studies and assessments, goes far beyond the accepted process of scientific peer review, and would significantly delay any new measures to address these threats. As mentioned previously, gathering evidence on extremely rare species is a time-consuming process. Time the species may not have.

For vaquita porpoises I am often asked whether they are doomed to extinction because the low numbers will inevitably result in inbreeding depression and drive

[1] Deepwater Horizon Marine Mammal Injury Quantification Team (DWH MMIQT), Models and analysis for the quantification of injury to Gulf of Mexico cetaceans from the Deepwater Horizon oil spill (2015).

the species extinct. The Status Review rated genetic risks as severe because Rice's whales, like vaquitas, have low genetic diversity. One reason scientists worry about the genetic risks for small populations is inbreeding depression, which is reduced birth rates or increased death rates resulting from close relatives mating and exposing double doses of bad genes. We recently published a paper showing vaquitas to be less vulnerable to such problems because of their natural rarity than naturally abundant species because they had at least 200,000 years to purge their bad genes (Robinson et al. 2022). It is possible that Rice's whale will have a similar pattern. But even if they don't, there are many species that have recovered from very low numbers. For example, Northern elephant seals were thought to have fallen to as few as 30 individuals from many years of hunting. A small island population off Mexico has grown and recolonized the historical range and now numbers well over 150,000 individuals. Despite the slaughter of millions of large whales, there is no similar recovery event to tell us about their genetic resilience, since no species has declined to only 50 individuals, as is the case for Rice's whale. But other baleen whale species, such as Southern right whales and humpback whales, have bounded back from population numbers decimated by hunting. Fortunately, like vaquitas, Rice's whales continue to reproduce.

The Endangered Species Act (ESA) notes that wildlife "are of esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people". The extirpation of many species of large whales inspired both the ESA and the MMPA. It is both a privilege and a burden to host the only large whale species found, as far as is known, within the waters of a single nation. It is a privilege because the Gulf of Mexico must be a very special place to have its very own large whale species. It is a burden because such a species is naturally vulnerable and requires special protections. Now that the species numbers only around 50 individuals, those protections must be prompt and adequate to avoid the fate of the Yangtze river dolphin and the likely fate of vaquitas. Neither China nor Mexico have the strong environmental legislation and rule of law that the U.S. has been a world leader in implementing.

Thank you for this opportunity to testify.

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QUESTIONS SUBMITTED FOR THE RECORD TO DR. BARBARA TAYLOR, INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE (IUCN)

Questions Submitted by Representative Huffman

Question 1. Could you explain what the lack of Rice's whale calls at the GI recorder South of Louisiana could mean for the species distribution?

Answer. A lack of Rice's whale calls at the GI recorder is not a significant factor in the determination of the distribution of the whale in the Gulf of Mexico. The more important factor is that thousands of recordings of call from Rice's whales were gathered at the western-most recorders.

First, the lack of calls at the GI recorder is not evidence that Rice's whales do not move between where whales were detected in the west, south of western Louisiana and Texas, and the De Soto Canyon habitat in the east. The acoustic data indicate that calls most common in the west are occasionally detected in the east on about 6% of the days, which is consistent with some movement between those areas. However, Soldevilla et al. (2022b) state that "given the current data, it remains unknown whether animals are moving between the northwestern and northeastern sites or whether these represent different groups of animals."

Second, the physical location of this particular recorder could be a factor in the lack of recorded calls. The GI recorder is set within a canyon indented from the general shelf break running along the northern Gulf. The distance a whale's call could be heard is unknown, both because of potential sound shadows from the canyon itself and because of relatively high shipping noise in the location of that hydrophone, which could mask the whale's low-frequency calls. Indeed, Soldevilla et al. (2022b) state that higher levels of ambient noise in the western Gulf is likely to significantly reduce the range over which calls are detectable. Because whales' calls are made to facilitate feeding or to communicate, they may call infrequently or not at all it they are transiting from one area of good habitat to another. So, an absence of detected calls at the GI location, while it is difficult to interpret, should not be construed to mean that the whales are not present there.

Finally, and importantly, the presence of calls off western Louisiana and Texas, as well as in the eastern Gulf, is clear evidence that Rice's whales are utilizing these areas. Nearly 2,000 calls were detected at the western-most recorder. Those

results are conclusive proof that Rice's whales were present there in every season. In fact, such a high frequency in the number of calls in that western location is clear evidence that De Soto Canyon is not the sole habitat for Rice's whale. In short, the many calls accumulated on that western-most recorder establish that this whale occupies an area extending westward from that Canyon. The lack of recorded calls at the GI recorder does nothing to change that fact. That clear and direct evidence is further supported by studies of the whales' prey, which indicate that their primary prey species is found along the continental shelf break across the northern Gulf (Kiszka et al. 2023).

Questions Submitted by Representative Dingell

Question 1. Dr. Taylor, the oil and gas industry has claimed that there's little scientific evidence to suggest the whale's habitat extends into the central and western Gulf of Mexico, where the industry mainly operates. And it has attacked peer-reviewed scientific studies that claim otherwise. As someone with decades of experience in marine mammal biology, do you agree with the industry's characterization of the existing evidence?

Answer. The industry characterization of the evidence regarding the critically endangered Rice's whale is both unsupported and fundamentally wrong for many reasons. I completely disagree with the characterization offered by those speaking for the industry. That characterization ignores robust, peer-reviewed evidence showing that the whale occupies areas west of De Soto Canyon. Moreover, it provides a misleading picture of the status of Rice's whale that would lead to very dangerous delays in vital efforts to protect the whale from extinction.

1,276 days of acoustic data from the western and central areas of the northern Gulf of Mexico have been analyzed and published in a peer-reviewed journals (Soldevilla et al. 2022a, 2022b) by scientists recognized in the marine mammal field as leading experts in whale acoustics. Peer-review is the accepted way to screen out scientific findings that are not sound. If scientists find fault with published findings it is incumbent upon them to publish the reason they find the science unsound in the peer-reviewed literature. To date, no scientist has found fault with the published findings.

These data (analyzed in the peer-reviewed paper by Soldevilla et al. 2022b) indicate persistent presence of Rice's whales in both the western and central Gulf, with higher presence in the westernmost recorder. For rare marine mammals, particularly those found far from easily accessed coastal waters, acoustic recordings offer the best method to characterize habitat usage because a large amount of data can be amassed in a relatively short period of time. Acoustic monitoring can occur 24-hours-per-day, regardless of weather, across weeks, months and seasons. In contrast, visual ship surveys are only within areas where the whales occur for a few days. Therefore, the information presented and analyzed in the Soldevilla paper is the best available science on the question whether Rice's whales are found west of DeSoto Canyon—and it demonstrates conclusively that the whales do inhabit that area.

The industry testimony with respect to Rice's whales not only largely ignores this key evidence, it also introduces unsupported excuses for delaying efforts to protect the whale population. Testimony by Alexandria Loureiro on behalf of the EnerGeo Alliance states that "there is no evidence that the population is declining, nor that animals are vulnerable to an acute anthropogenic threat." As a scientist with over 30 years of experience in estimating trends in abundance for marine mammals, I can attest that requiring evidence of decline is inappropriate for a critically endangered species. In 2007, I was lead-author on a study calculating the statistical likelihood of detecting a precipitous decline in various marine mammal populations off the United States, given the frequency and precision of monitoring efforts (Taylor et al. 2006). Given the whale's very small abundance and the precision of current estimates, it would take no less than 45 years of annual surveys to determine? with high confidence typically demanded in scientific studies that the species is declining at 2%-per-year (one anthropogenic death annually). And why, with 50 individuals remaining would such a delay be justified? Clearly, this kind of delay cannot be justified; these whales are running out of time.

Ms. Loureiro also expresses some skepticism over the threat presented to Rice's whales from ship strikes. But there is sufficient evidence to strongly infer that ship-strikes are an acute anthropogenic threat to these whales. It is clear from tagging data (Soldevilla et al. 2017, Kok et al. 2023) that the whales spend most of their lives in waters shallow enough to be hit by ships; and ship traffic within their habitat is high enough to result in deaths that the population cannot sustain. Indeed,

one whale death has been attributed to vessel strike, and another whale has severe deformation of the dorsal fin strongly indicative of vessel strike—a record that almost certainly underestimates the actual number of strikes, since the majority of mortalities of cetacean species go undetected and unreported. If Ms. Loureiro finds specific fault with the models used by NOAA and others to estimate ship-strike mortality, then such faults should be noted and discussed.

Loureiro also presents misleading testimony by stating that "Rice's whale detections are quite rare" and then proceeding to present Rice's whale sightings, but not Rice's whale acoustic detections. This is an effort to distract members of the subcommittee by diverting their attention away from a key piece of evidence: the nearly 2,000 acoustic Rice's whale calls detected on the westernmost recorder cannot be categorized as 'rare'. She further claims that relying on a single study (Soldevilla et al. 2022b) is unscientific, without providing any explanation as to why a peer-reviewed scientific paper including 1,602 days of data should not be relied upon as the best available scientific data. Instead, she states, without supporting justification, that protecting the central and western areas between 100 and 400m depths would 'provide no tangible benefit to the species'. At the same time, she strongly supports requiring a study (which the Graves bill does not fund) conducted by the National Academies of Science Engineering and Medicine (who lack expertise in marine mammalogy) to determine the occurrence of Rice's whales, without specifying why the published and ongoing studies are in any way inadequate.

Question 2. Dr. Taylor, it was incredibly powerful to hear you mention your direct experience with extinction and endangered animals. If you could do something for the Rice's whale tomorrow, what would it be? And what does Congress need to do to prevent the extinction of this species?

Answer. The greatest immediate threat to Rice's whales given the best available science is ship-strike. A great deal of research has shown that reducing the speed of ships reduces the probability of lethal ship strikes of baleen whales. Rice's whales have been documented to utilize shelf-break waters from 100–400m, so the most efficient means to reduce Rice's whale deaths is to slow ships transiting through those waters.

Prompt actions are needed to prevent extinction. From the whale's point of view, little has changed to reduce threats since the species suffered an estimated population decline of 22% in the *Deepwater Horizon* Oil Spill. In fact, in the intervening years since that spill there have been more documented human-caused mortalities. Small populations are vulnerable to what conservation biologists call 'the extinction vortex' where risks feed back upon each other, causing the species to decline faster and faster. For example, because of high levels of ambient noise in their habitat, whales may not be able to find each other to mate, leading to lower birth rates which leads to fewer whales in the breeding pool which can lead to inbreeding depression and so forth. The most important action in an emergency room with a bleeding patient is to stop the bleeding. Similarly, the most important action for a critically endangered species is to stop the threat that is known to cause deaths, in this case reducing deaths by ship-strike.

There are other actions that could be taken, particularly as research continues to add evidence about the lives of these last whales. Acquiring data rapidly takes adequate funding. Congress can definitely help save this special large whale species living in our waters by funding more research to better understand its needs and threats and improve future conservation actions. However, research should not be used as an excuse to delay actions. Delay increases threats to the species by allowing the worst thing that could be done for Rice's whale, and that is doing nothing.

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Mr. BENTZ. Thank you, Dr. Taylor.

The Chair now recognizes Mr. Steven Roady, Senior Lecturing Fellow, Professor of the Practice, Duke University in Washington, DC.

Mr. Roady, you are recognized for 5 minutes.

STATEMENT OF STEPHEN ROADY, SENIOR LECTURING FELLOW, DUKE UNIVERSITY SCHOOL OF LAW, PROFESSOR OF THE PRACTICE, DUKE SCHOOL OF THE ENVIRONMENT, WASHINGTON, DC

Mr. ROADY. Good afternoon, Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee. Thank you very much for this opportunity to testify today as you consider several bills that relate to the Endangered Species Act.

I currently teach at Duke University, but for 40 years prior to that I was practicing environmental law in Washington, DC, environmental law and policy. A number of my cases involved endangered species, and I feel as if I have fairly good knowledge of how the Act is supposed to work.

The three bills in front of us today, as Ranking Member Huffman has already pointed out, are completely antithetical to the purposes of the Endangered Species Act.

The Act was passed with strong bipartisan support in 1973. Its central purpose is to preserve and protect ecosystems and to prevent and halt extinction of species. It has been wildly successful over the years.

There was a very famous case decided in 1978 by the U.S. Supreme Court, *Tennessee Valley Authority v. Hill*, in which the court said that the Act was clear that the species would be given the highest priority for protection. In that case, in fact, the Court ruled that a dam that was about 80 percent complete could not be completed because completion of the dam would risk rendering extinct a small fish behind the dam. Ever since that ruling in the Supreme Court case, the policy of this country has been to protect species from being endangered and to reverse extinction risks. The three bills in front of us today run counter to this trend. I will just take them in order.

H.R. 520 is the one that would basically, as Ranking Member Huffman has already explained, force the government to treat artificially propagated species as if they are natural species in the wild. This completely ignores the central purpose of the Act to protect ecosystems and species in the wild. The fact of the matter is nature is not a zoo. Just counting tigers in the zoo doesn't mean you have saved the tiger from extinction. So, it is a really dangerous thing to do, to do what H.R. 520 would do.

H.R. 5004 would basically halt the current Administration from putting back in place rules that were basically designed to further

the purpose of the Act in several ways. Those rules made it clear that you could not consider economic factors when you were initially listing a species as being threatened or endangered. The Trump administration removed that provision.

The rules would also make it clear that once a species is listed as threatened, you would automatically kick in some protections for that species. The Trump administration removed those. These are the kinds of things that the current Administration is trying to put back into place. And, therefore, H.R. 5504 goes in the wrong direction.

And then, turning finally to H.R. 6008, Representative Graves' bill, it would be harder to conceive of a piece of legislation that would be more centrally destructive of the purpose of the Endangered Species Act to prevent extinction. As Dr. Taylor has just pointed out, we are looking at a whale species in the Gulf of Mexico that is down to about 50 individuals. This species is so critically endangered that the government has testified the loss of even one reproductively active female whale could render the species extinct.

There really is no room for error on this whale, and yet the bill sponsored by Representative Graves basically would put a halt on all efforts to protect the whale. It would basically stop the government from going back to use brand-new science that has come into the arena in the 4 or 5 years since the BP Horizon disaster, which shows that the whales now exist in large numbers west of the DeSoto Canyon. It would prevent the government from going forward with a biological opinion until there is a totally unfunded study conducted by the National Academies of Science, which could take a number of years. As Representative Huffman has pointed out, it would give industry a seat at the table in these negotiations over the biological opinion.

It is really the wrong way to go. It runs counter to the purposes of the Endangered Species Act, and it really should not be approved. In fact, none of these bills, in my view, merit the approval from this Subcommittee, as they all run counter to the Endangered Species Act.

Thank you again for the opportunity to testify, and I would be glad to respond to any questions.

[The prepared statement of Mr. Roady follows:]

PREPARED STATEMENT OF STEPHEN ROADY, SENIOR LECTURER, DUKE UNIVERSITY SCHOOL OF LAW; PROFESSOR OF THE PRACTICE, DUKE SCHOOL OF THE ENVIRONMENT

ON H.R. 520, H.R. 5504. AND H.R. 6008

Good afternoon, Chairman Bentz, Ranking Member Huffman, and Members of the Subcommittee. Thank you for inviting me to this legislative hearing today as you consider several bills relating to the Endangered Species Act.

My name is Stephen Roady. I teach at Duke University, both in the Law School and at the School of the Environment. My courses include classes on ocean and coastal law and policy, and on environmental law and litigation. Prior to joining the Duke faculty, I practiced environmental law for 40 years here in Washington, and also engaged in ocean policy work. My law and policy practice included a number of cases that involved species protected by the Endangered Species Act, such as whales and sea turtles. I am appearing today in my individual capacity, and am not speaking on behalf of Duke University.

Introduction

As requested in your invitation, I will focus on three of the bills under consideration today by the Subcommittee: H.R. 520, H.R. 5504, and H.R. 6008.

My testimony today emphasizes the vital importance of the Endangered Species Act, particularly at this time when we are facing a biodiversity crisis, and highlights ways in which these bills are inconsistent with the central purposes of that Act.

I will begin with a review of the origins and purposes of the Endangered Species Act (ESA or Act). Next, I will highlight the importance of current efforts by the federal government to revise regulations that implement the Act. Finally, after touching on the reasons for ensuring that wild populations should be protected in their natural habitat, I will address the problems and risks associated with H.R. 6008, especially as they relate to the possibility of extinction for a species of large whale in the Gulf of Mexico known as Rice's whale.

1. Importance and Success of the Endangered Species Act

Congress passed the Endangered Species Act with overwhelming bipartisan support in 1973 in response to a growing awareness of extinction threats facing many species. The Act was the product of a collaboration between a Democrat, John Dingell of Michigan, and a Republican, Pete McCloskey of California, and it originated in the precursor to this very subcommittee.

The Act is designed to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . . ."[1] The Act has two central purposes: (1) to prevent species from extinction, and (2) to recover their populations to healthy levels in their natural habitats.

The Act seeks to protect and recover imperiled species in a straightforward manner. First, it provides for a process that lists species in need of protection. Second, it prohibits both individuals and federal agencies from taking actions that harm listed species.

Under the Act, species can be listed as threatened or endangered based on five statutory factors. These factors include destruction of species habitat or range, as well as man-made factors affecting the continued existence of the species. The Act explicitly states that listing decisions are to be made "solely on the basis of the best scientific and commercial data available."[2] Thus, economic factors are not allowed to be considered when deciding whether to list a species as protected under the Act.

The ESA defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range."[3] A threatened species is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[4] At the time that a species is listed as threatened or endangered, the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (the two agencies charged with administering the Act) must consider the designation and protection of critical habitat for the species, defined as areas that are essential for the survival and recovery of the species.[5]

The principal operating architecture of the Act is contained in Sections 4, 7, and 9. Section 4 sets out the process by which a species can become listed, and its habitat protected as "critical." As part of that process, subsection 4(d) requires the government to establish regulations to conserve threatened species, including by prohibiting "take" of that species.[6] Section 7 prohibits federal agencies from jeopardizing the existence of listed species, and also from adversely modifying critical habitat of those species.[7] Section 9 prohibits any person from "taking" any endangered species.[8] The Act defines the term "take" broadly, as follows: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[9]

The Supreme Court emphasized 45 years ago that the clear intention of Congress in enacting the ESA "was to halt and reverse the trend toward species extinction,

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[1] 16 U.S.C. § 1531(b).
[2] 16 U.S.C. § 1533(b)(1)(A).
[3] 16 U.S.C. § 1532(6).
[4] 16 U.S.C. § 1532(20).
[5] 16 U.S.C. § 1532(5)(a).
[6] 16 U.S.C. § 1533, 1533(d).
[7] 16 U.S.C. § 1536(a)(2).
[8] 16 U.S.C. § 1538(a)(1).
[9] 16 U.S.C. § 1532(19).

whatever the cost."[10] In the famous case of *Tennessee Valley Authority v. Hill*, the Court noted that this central purpose "is reflected not only in the stated policies of the ESA, but in literally every section of the statute."[11]

The Endangered Species Act has proved to be a bulwark against the erosion of biodiversity in this country. Since its passage, the Act has prevented the extinction of 99 percent of the species under its care, including the gray whale, the California condor, the Florida manatee, and our nation's symbol, the bald eagle. Not only is the ESA highly effective, but it is also wildly popular, with 90 percent of Americans supporting the Act.[12]

The importance of the ESA has never been more evident. Scientists agree that we are in the midst of an unprecedented biodiversity crisis: worldwide, we are losing species at a rate unparalleled in human history.[13] A recent comprehensive report from the United Nations Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services concludes that nature is in a dangerous decline, with species extinction rates accelerating.[14] This crisis threatens the ecosystems upon which we all depend, and has the potential to threaten not only our environment, but also public health.[15]

Under these circumstances, it is surpassingly important that we ensure this country continues to carry through with the central intention of the Act: to halt and reverse the trend toward species extinction. Unfortunately, the three bills before the Subcommittee today do just the opposite.

2. Observations on H.R. 5504

In the midst of the current biodiversity crisis, we should be working to strengthen, not weaken, the Endangered Species Act, which is our nation's best hope for helping to prevent extinction. This is what the current Administration is doing; it has proposed rules that would help ensure that the purposes of the Act are implemented in a manner faithful to the purposes and language of the Act. By contrast, H.R. 5504 would suspend that rulemaking effort, and would instead leave in place regulations that weaken the Act.

The previous Administration took a major step in the wrong direction by adopting several regulatory revision packages that violate the ESA, weaken its implementation, and undermine its purpose of conserving imperiled species and the ecosystems upon which they depend.[16] Briefly stated, these revisions: (1) allowed the consideration of economic factors as part of the decision to list species as threatened or endangered, (2) eliminated automatic protections from harm for any species listed as threatened, (3) allowed consulting agencies to rely on an action agency's claim that it will mitigate any incidental harm to affected species without requiring any demonstration of specific binding mitigation plans, and (4) allowed agencies to consider whether modifications or destruction of critical habitat are significant when compared to the value of that habitat "as a whole." Each of these revisions undermines the purposes and efficacy of the Act.

The rules proposed by the current Administration would correct those illegal regulatory revisions. They are designed to return to the original intention of the Act. Among other things, the proposed rules would reinstate prior language affirming that listing determinations are made without reference to possible economic impacts.[17] In addition, the proposed rules would reinstate the government's practice

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[10] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

[11] *Id*. at 180.

[12] Tulchin Research, "Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters nationwide," July 6, 2015: http://www.defenders.org/publications/Defenders-of-Wildlife-National-ESA-Survey.pdf.

[13] Gerardo Caballos, Paul R. Ehrlich, Rodolfo Dirzo, "Biological annihilation via the ongoing sixth mass extinction signaled by vertebrate population losses and declines," PNAS, July 10, 2017: https://www.pnas.org/doi/full/10.1073/pnas.1704949114.

[14] UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating': https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/

[15] Dirk Schmeller, Frank Courchamp, and Gerry Killeen, "Biodoversity loss, emerging pathogens, and human health risk," 29 Biodiversity and Conservation 3095-3102 (2020): https://link.springer.com/article/10.1007/s10531-020-02021-6.

[16] Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg.44753 (August 27, 2019) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44976 (August 27, 2019) (to be codified at 50 C.F.R. pt. 402); Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020 (August 27, 2019) (to be codified at 50 C.F.R. pt. 424).

[17] 88 Fed. Reg. 40764 (June 22, 2023).

of automatically extending the protections of Section 9 (prohibiting "take") to species listed as threatened.[18]

Numerous parties have filed comments on these proposed rules, and the government is now reviewing those comments. Given the fundamental importance of protecting against the biodiversity crisis, the process should be allowed to proceed so that the government can decide on its final proposals in light of all relevant information generated in the comment process. But H.R. 5504 would shut down this process. Therefore, H.R. 5504 should not be approved.

3. Observations on H.R. 520

Like H.R. 5504, the provisions of H.R. 520 would weaken the Endangered Species Act. This bill would allow the government to rely upon artificially-propagated species to substitute for the loss of wild species. In addition, it would require the government to make no distinction between artificially-propagated species and natural species in making determinations under the Act. If enacted, this bill would erode—rather than enhance—protections for threatened and endangered species.

In particular, H.R. 520 would risk taking the focus away from a fundamental purpose of the ESA: ensuring that species thrive over the long term by protecting the ecosystems on which they depend, and to which they contribute. Salmon on the West coast are the perfect example of why it simply does not work to protect species as somehow separate from their habitats. Salmon born in mountain streams and creeks are a source of food for countless other species as they migrate to the ocean, where they are both predator and prey for carefully balanced marine ecosystems. The adult salmon that return to these streams to spawn the next generation, and then die, bring vital marine-derived nitrogen deep into inland landscapes, such that forests as far inland as central Idaho have evolved to depend on the annual boost of nitrogen from spawning salmon.

In short, H.R. 520 would destroy one of the central pillars of the Endangered Species Act. For this reason alone, H.R. 520 should not be approved.

4. Observations on H.R. 6008

H.R. 6008 is a particularly problematic example of an effort to undermine the Endangered Species Act. If approved, it would delay protections for the critically endangered Rice's whale, increasing the already-considerable risk that the whale would become extinct. Nothing could be more antithetical to the purposes and the plain language of the Act.

H.R. 6008 is being proposed after a long effort by a number of parties to protect the endangered Rice's whale from the effects of oil and gas activities in the Gulf of Mexico. The best available scientific evidence demonstrates that Rice's whale lives only in the Gulf, that only about 50 individual whales remain alive, and that the species is facing the possibility of extinction as a result of oil pollution, ship strikes, and noise.[19] Under these circumstances, immediate actions are needed to preserve both these whales and their habitat. Regrettably, H.R. 6008 would prevent such action, and would instead postpone efforts to protect this whale from harm. Delay of the kind promoted by H.R. 6008 poses great risk to the very survival of Rice's whale.

The best science starkly demonstrates how closely Rice's whale is hovering near extinction. The condition of the whale is so acute that the National Marine Fisheries Service has concluded that "the loss of even a single reproductive female could lead this species to extinction."[20] The seriousness of the imminent peril facing this whale was underscored further in an October 2022 letter, signed by more than 100 marine science experts from across the country, which notified the federal government that the whale urgently needed protection from oil and gas activities in the Gulf in order to avoid extinction.[21]

Rice's whale is the only great whale species resident year-round in U.S. waters. It is acutely vulnerable to vessel strikes, as it spends the majority of its time near the ocean surface—about 90% of the time at night, when the whales come to the

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[18] 88 Fed. Reg. 49742 (June 22, 2023).

[19] 84 Fed. Reg. 15,466 (Apr. 15, 2019) (listing primarily because of "its small population size and restricted range" and harm from "energy exploration, development and production, oil spills and oil spill response, [and] vessel collision.")

[20] Comments of Andrew J. Strelcheck, NMFS Regional Administrator for the Southeast Regional Office, to Tershara Matthews, Chief of Emerging Programs, BOEM, on Draft Environmental Assessment for commercial leasing wind power development on the Outer Continental Shelf in the Gulf of Mexico 6 (Feb. 9, 2022).

[21] P. Corkeron et al., An Open Letter to the Biden Administration, Oct. 12, 2022 (statement of approximately 100 marine Scientists), available at https://www.neaq.org/wp-content/uploads/2023/06/Scientist-statement.-GoM-whale.-Oct.-2022.pdf

surface to rest, and 70% of the time overall.[22] Their behavior therefore places them at significant risk of being struck by large commercial vessels. In a 2020 Biological Opinion, the National Oceanic and Atmospheric Administration (NOAA) found that mortalities from vessel strikes are likely to exceed—by more than ten times—what the species can sustain.[23,24]

Oil and gas industry operations in the Gulf of Mexico have already very significantly degraded the population of Rice's whale, and they are a major contributor to vessel strike risk for the whale. In 2020, NOAA found that the oil and gas industry represents about one-third of the total risk from vessels transiting through the whale's habitat.[25] A very recent update by a former Duke University researcher using the latest data on Rice's whale distribution shows that industry vessels are responsible for an even larger share of that risk of ship strikes: about 40% of the total.[26] Furthermore, the National Marine Fisheries Service estimates that the BP Deepwater Horizon oil spill eliminated 22% of the species' population.[27]

In the wake of the Deepwater Horizon disaster, the National Marine Fisheries Service (NMFS) intensified its study of Rice's whale, and has recently released serval peer-reviewed studies demonstrating that the whale's habitat stretches across the continental shelf break in the Northern Gulf of Mexico from the Mexico border to Florida. Based on confirmed observations, acoustic recording of the whales' calls, and habitat modeling, these studies demonstrate that the whale "persistently" occurs in waters 300-1200 feet (100-400 meters) deep throughout this northern Gulf shelf break.[28-31]

The "stipulated agreement" referenced in H.R. 6008 is a federal court-approved document that emerged from a court-supervised mediation process. This agreement puts a hold on a lawsuit filed in 2020 against a Trump Administration biological opinion governing Gulf of Mexico oil and gas activities. That biological opinion failed to evaluate accurately the potential for future oil spills in the Gulf and did not require sufficient safeguards to protect imperiled Rice's whales, sea turtles, and other endangered and threatened marine species from industrial offshore drilling operations.

After more than two years of litigation, and based on new information about oil spill risk and the new science about Rice's whale habitat throughout the Gulf, the government announced that it would reconsider that 2020 decision. In order to gain a more accurate and up-to-date understanding of the threats to the whales—and the protections to mitigate them—throughout its northern Gulf habitat, the government is already engaged in this new biological review of the best available science.

The "stipulated agreement" to temporarily pause the case while this expanded assessment takes place is based on three short-term actions that are designed to better safeguard Rice's whales during the one-year period that the case is on hold:

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[22] Biological Opinion on the federally Regulated Oil and Gas Program Activities in the Gulf of Mexico (Mar. 2020) at 347

[23] *Id*. at 363 (concluding that even with proposed mitigation, there would still be "16 vessel strikes of Bryde's whales over 50 years, with 12 of these strikes expected to result in serious injury or mortality").

[24] Hayes SA, Josephson E, Maze-Foley K, Rosel PE, Turek J, editors. 2021. US Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2020. Woods Hole (MA): National Marine Fisheries Service. Report No.: NOAA Technical Memorandum NMFS-NE-271. 403 p. doi:10.25923/nbyxp656 (estimating a "potential biological removal" of 0.1, which means that only one Rice's whale can die from non-natural causes per decade in order for the species to reach a sustainable population)

[25] 2020 Biological Opinion, *supra*, n. 22 at 358.

[26] Spatial analysis of ship-strike risk for Rice's whale in the Gulf of Mexico, Benjamin D. Best, Ph.D., available at https://ecoquants.com/ricei/#ref-nmfsBiologicalOpinionfederally2020

[27] 2020 Biological Opinion, *supra* n. 22 at 268.

[28] Soldevilla, et al., *Spatial distribution and dive behavior of Gulf of Mexico Bryde's whales: potential risk of vessel strikes and fisheries interactions*, 32 Endangered Species Rsch. 533 (June 2017), available from https://repository.library.noaa.gov/view/noaa/16050.

[29] NOAA RESTORE Science Program, "Trophic Interactions and Habitat Requirements of Gulf of Mexico Rice's Whales," available at restoreactscienceprogram.noaa.gov/projects/rices-whales NOAA Fisheries, "Trophic Interactions and Habitat Requirements of Gulf of Mexico Rice's Whales," available at https://www.fisheries.noaa.gov/southeast/endangered-species-conservation/trophic-interactions-and-habitat-requirements-gulf-mexico

[30] J.J. Kiszka, M. Caputo, J. Vollenweider, et al. Critically endangered Rice's whale (*Balaenoptera ricei*) selectively feed on high-quality prey in the Gulf of Mexico, Scientific Reports 13: art. 6710 (2023).

[31] N.A. Farmer, J.R. Powell, J.A. Morris, Jr., et al. Modeling protected species distributions and habitats to inform siting and management of pioneering ocean industries: A case study for Gulf of Mexico aquaculture, *PLoS ONE* 17: art. e0267333 (2022).

1. The Bureau of Ocean Energy Management (BOEM) will exclude Rice's whale habitat from any lease sales that occur while the lawsuit stay is in effect.
2. BOEM will require future oil and gas leaseholders to reduce the risks of vessel strikes to Rice's whales throughout their northern Gulf habitat. Any lease sales held during the stay of the lawsuit will include a requirement reducing oil-and-gas-related vessel speed to 10 knots when traveling through the whale's defined habitat until a new biological opinion is completed.
3. BOEM notified existing oil and gas leaseholders of the threat that vessels pose to Rice's whales and reminded operators of their responsibilities to avoid "take" (harming, killing, or harassing) of protected species when seeking permits. It also outlined recommended vessel speed reductions and measures operators should take in the whales' habitat.

Expert scientists believe that these stop-gap measures established in the "stipulated agreement" are insufficient to protect and recover these whales in the long-term. Nevertheless, they will make conditions relatively better for the whales while the government evaluates what protective measures are needed to assure the species' long-term survival. They are the kind of responsive actions that the Endangered Species Act requires and encourages in light of new science.[32]

The first two of these measures are currently being challenged in court by several oil companies and the State of Louisiana. That case is ongoing. H.R. 6008 would not only short-circuit that litigation, but would also prevent the government from implementing the agreement itself, and thereby remove those protections for the whales at a time when they are on the verge of extinction.

In addition to preventing the government from implementing these interim measures that would help protect Rice's whale until the government's evaluation is complete in September 2024, H.R. 6008 would impose further layers of delay on efforts to establish other needed protections.

Among other things, if approved, H.R. 6008 would prohibit BOEM from moving forward to implement any other additional protections for Rice's whales until a new Biological Opinion is completed. But at the same time, it would delay and interfere with the agency's production of that Biological Opinion. First, it would prohibit NMFS from beginning work on a new Biological Opinion until after a recently-proposed Critical Habitat Designation is finalized. And even after the agency's review is complete, H.R. 6008 would require NMFS to await publication of a separate and redundant National Academies study of the Rice's whale range before it issues the new Biological Opinion. Such a study could take several years to complete.

H.R. 6008 would further interfere with the government's ongoing evaluation by requiring NMFS to hold special meetings with industry about any proposed Reasonable and Prudent Alternatives (RPAs). This unusual procedure would allow industry an unrebutted opportunity to influence decisions on alternative actions.

In summary, H.R. 6008 would strip away vitally necessary protections from a whale that is on the verge of extinction, and in their place would impose a series of delays on efforts to reduce risks posed to the whale by oil and gas activities in the Gulf of Mexico. In so doing, it would increase the risks to that whale at precisely the time it is most in need of the protections that are at the heart of the Endangered Species Act. Accordingly, H.R. 6008 should not be approved.

Conclusion

All of the bills under consideration by the Subcommittee today that are related to the Endangered Species Act—H.R. 520, H.R. 5504, and H.R. 6008—are inconsistent with the central purposes and plain language of that Act. They should not be approved.

Thank you again for the opportunity to meet with you today. I would be glad to respond to questions.

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[32] *See* "Editorial: Rice's whale is a rare Gulf treasure—one endangered by oil drilling" *Houston Chronicle* (Jan. 24, 2023).

QUESTIONS SUBMITTED FOR THE RECORD TO STEPHEN ROADY, SENIOR LECTURING FELLOW, DUKE LAW SCHOOL

Questions Submitted by Representative Huffman

Question 1. Can you explain what opportunities for engagement and/or input impacted parties, like oil and gas companies, had throughout the stipulated agreement process for Lease Sale 261?

Answer. Thank you for your question. I am providing this response in my individual capacity; it is not being presented as the position of Duke University.

I appreciate the opportunity to address this issue, because there was an unsubstantiated suggestion during the October 25 hearing that the oil and gas industry was somehow not provided an opportunity to engage in the process that led to the Stipulated Agreement with respect to Lease Sale 261. That suggestion is not correct. In fact, it was the oil and gas industry itself that introduced the idea for that process, and the industry engaged in it closely from start to finish. And at the end of that process, the oil and gas industry was provided a final opportunity to comment. Although it expressed concerns, the industry ultimately did not ask the supervising court to withhold approval of the Agreement.

The Stipulated Agreement for Lease Sale 261 is the result of a mediation process that was triggered by litigation filed originally in 2020 by several conservation groups against the federal government. I was not involved in that litigation, but I have reviewed the publicly available filings that are available in the court docket for that case. Those court filings show that the oil and gas industry, including several individual companies, were intervening parties to the litigation and participated directly in the court-ordered mediation process that culminated in the Stipulated Agreement. In particular, those filings show that the American Petroleum Institute (API), on behalf of the oil and gas industry, invited the court to require the parties to the case "to participate in a mediated settlement discussion." These filing also show that the industry then participated closely in that mediated discussion, and that it was that discussion which eventually led to the Stipulated Agreement.

As is standard practice in mediation, this judicially-supervised mediation process was subject to a confidentiality agreement, in order to encourage full and frank discussions of positions. So, it is not possible to know what positions those parties took during the mediation process, or to assess the full nature of the discussions. But the court record includes multiple filings demonstrating the industry's very close involvement in the mediation process itself.

By way of background, the docket entries for this case show that the Plaintiffs in the underlying litigation—Sierra Club, Center for Biological Diversity, Friends of the Earth, and Turtle Island Restoration Network—filed a case in the U.S. District Court for the District of Maryland challenging a 2020 Biological Opinion issued under the Endangered Species Act. *Sierra Club, et al., v. National Marine Fisheries Service., et al.*, No. 8:20-cv-03060 (filed Oct. 21, 2020) (Complaint for Declaratory and Injunctive Relief). In that 2020 Biological Opinion, the National Marine Fisheries Service (Service) endeavored to analyze whether the next 50 years of federally authorized oil and gas activities on the outer continental shelf in the Gulf of Mexico would jeopardize the continued existence of any threatened or endangered species.

The 2020 Biological Opinion concluded that, without mitigation, these oil and gas activities would jeopardize the survival and recovery of the critically endangered Rice's whale. As required by the Endangered Species Act, the Service therefore concluded the Biological Opinion with a "reasonable and prudent alternative" that according to the Service would, if adopted, prevent jeopardy to the whale by placing a 10-knot speed limit and other related restrictions on oil and gas-related vessel traffic in that particular part of the Gulf of Mexico the Service then considered to be the whale's habitat. In their complaint filed on October 21, 2020, the Plaintiffs challenged the analysis in the Biological Opinion on multiple grounds as arbitrary and capricious and challenged the Service's "reasonable and prudent alternative" as insufficient to avoid jeopardy to Rice's whale, in violation of the Endangered Species Act.

The American Petroleum Institute (API), EnerGeo, the National Ocean Industries Association, and Chevron U.S.A. (Chevron) then moved to intervene as defendant parties in the suit. The docket shows that the court granted their intervention on May 12, 2021. The process that led to the mediation and Stipulated Agreement began a bit later, as the court briefings unfolded in the case.

Specifically, as reflected in the court docket, on October 25, 2022, the Bureau of Ocean Energy Management (BOEM) sent a letter to the National Marine Fisheries Service requesting that the Service reinitiate Endangered Species Act formal consultation on the 2020 Biological Opinion—to essentially start the process anew based on new analyses of oil spill risks and other information. In response, the Service filed a motion asking the court to remand that Biological Opinion back to the Service, while leaving it in place, unchanged. The docket entries reveal that this request essentially asked the court to hand the matter back to the agency for a do-over, but to allow BOEM and the Service to continue relying on the admittedly outdated Biological Opinion to facilitate continuing oil and gas operations in the Gulf of Mexico while a new Biological Opinion was being prepared.

The entries in the court docket next show that Plaintiffs opposed the Service's request in large part because additional peer-reviewed scientific evidence had emerged demonstrating that Rice's whales "persistently occur" throughout the northern Gulf of Mexico in waters 100–400 meters deep and were therefore at far higher risk than the Service considered them to be in the 2020 Biological Opinion. The Plaintiffs argued that—should the Court be inclined to grant a voluntary remand of that Opinion while allowing oil and gas operations to continue unchanged—the Court should at a minimum impose interim protective measures that were necessary to protect the Rice's whale from this far greater risk during the 2-year consultation process that the Service and BOEM proposed to follow.

In responding to this request from the Plaintiffs for interim protective measures for the Rice's whale, the American Petroleum Institute (API) filed a document with the court stating that it was:

> "willing to engage with Plaintiffs and Federal Defendants to discuss potential *voluntary* interim measures that may be protective during any remand. During prior related litigation, a negotiated process was successfully used to develop interim measures while the 2020 BiOp was being prepared, and could be used again here. *See Nat. Res. Def. Council v. Salazar*, No. 2:10-cv-1882 (E.D. La.), Dkt. 189 (discussing 10-year history of settlement discussions and implementation). To that end, the Associations would not be opposed to an order requiring the parties to participate in a mediated settlement discussion and report back to the Court."

The parties then presented oral argument to the court on the question of how best to proceed, and at that argument, the court and the parties agreed with API's suggestion for a mediated settlement discussion. Accordingly, the docket reflects that on January 6, 2023, the court entered an order referring the case to mediation with a magistrate judge. The order specifically stated that the mediation would "include the plaintiffs, the defendants, and the intervenor defendants." Thus, the oil and gas industry parties (the intervenor defendants), after having suggested mediation, were expressly included in the mediation process.

The docket entries show that the ensuing mediation process began in late January and lasted until approximately mid-July, 2023. During that time, the parties—including the oil and gas industry intervenors—met in multiple sessions with a federal magistrate judge appointed by the court. While the substance of those sessions is covered by a confidentiality order signed by all the parties at the outset of the mediation, the parties filed joint status reports generally updating the court on the number of meetings held, summarizing the overall progress of the discussions, and seeking to extend the time for the discussions when warranted. The oil and gas industry intervenors signed each of these joint status reports.

On July 21, 2023, the Plaintiffs and the Service filed the Stipulated Agreement and asked to court to grant a stay of the litigation based on their substantive agreements. The Stipulated Agreement specified that the industry intervenors (including API and Chevron) objected to the stay agreement and established a schedule for them to present those objections to the court. In an August 4, 2023 filing, those objecting parties filed a response noting their "concerns" with the Agreement, but they did not formally object to the entry of the agreement and the entry of a stay in that litigation, stating: "Intervenors do not object to the entry of an order that requires Plaintiffs and [the federal government] to comply with the terms of the agreement . . ."

In summary, the public record of the litigation that gave rise to the Stipulated Agreement regarding Lease Sale 261 shows that the oil and gas industry was intimately involved with the mediation process that led to that Agreement. The mediation was prompted by a suggestion from the industry itself, industry representatives engaged directly in that mediation process, and ultimately did not object to an order from the court that directed the government to comply with the terms of the Agreement. While API, Chevron, and the other oil and gas industry

parties to that litigation did not agree to the results of the court-supervised mediation process, they were nonetheless directly involved in that process from the very beginning.

Questions Submitted by Representative Dingell

Question 1. The Endangered Species Act protects a number of marine species in the Gulf of Mexico, including the Gulf sturgeon, Florida manatee, and five species of marine turtles. How does the ESA manage to protect these and other species without causing a shutdown or collapse of commercial activity along the Gulf coast?

Answer. Thank you for your question. I am providing this response in my individual capacity; it is not being presented as the position of Duke University.

I appreciate the opportunity to address this issue, because there were suggestions during the October 25 hearing that the Endangered Species Act, (ESA) as applied to Lease Sale 261 in the Gulf of Mexico, might create significant adverse effects on the oil and gas industry, with the potential for highly negative economic impacts on the region. These suggestions are inaccurate. In fact, the Act is designed, and typically implemented, in a manner that carefully takes account of its potential effects on commercial activity. It has been in place since 1973, during which time hundreds, or even thousands, of oil and gas wells and associated exploration, development, and energy production activities have been initiated and operated in the Gulf region. The process that has been proposed by the government in an effort to comply with the ESA in connection with Lease Sale 261 continues the tradition of developing ways to protect endangered species without shutting down or collapsing commercial activity.

Congress enacted the ESA in 1973 to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). The ESA seeks to protect and recover imperiled species and populations by first listing them as threatened or endangered based on enumerated statutory factors. Id. § 1533(a)(1)(A)-(E); see id. § 1532(6),(20). The Act further provides for the designation of protected critical habitat for threatened and endangered species. Id. § 1533(a)(3)(A)(i).

Section 7(a)(2) of the ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." Id. § 1536(a)(2). The ESA and its implementing regulations establish an interagency consultation process to assist federal agencies in complying with this duty. An agency must consult with the appropriate wildlife service—the U.S. Fish and Wildlife Service or, in the case of oil and gas activity in the Gulf of Mexico, the National Marine Fisheries Service (NMFS)—under Section 7 whenever it takes an action that "may affect" a threatened or endangered species or critical habitat. Id.; 50 C.F.R. § 402.14(a). In accordance with this statutory process, the Department of the Interior's Bureau of Ocean Energy Management (BOEM) consulted with NMFS to determine whether lease sales in the Gulf of Mexico could affect threatened or endangered species, such as Rice's whale.

In fulfilling the requirements of Section 7, agencies must "use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). If the agency taking the action (the action agency) concludes the action may affect listed species or their critical habitats, it must initiate formal consultation with NMFS, unless the action agency determines and NMFS concurs in writing that the action is "not likely to adversely affect" any listed species or critical habitat. 50 C.F.R. §§ 402.13(c), 402.14(a), (b)(1). The result of the consultation between NMFS and BOEM regarding oil and gas activities in the Gulf was a decision that those activities could affect ESA-protected species; therefore, the two agencies entered into the formal consultation process.

Under the ESA, formal consultation requires NMFS to: (1) evaluate the current status and environmental baseline of affected species and critical habitats, (2) assess the effects of the action and cumulative effects on those species and habitats, and (3) analyze whether the effects of the action, when added to the environmental baseline together with any cumulative effects, is likely to jeopardize the continued existence of the species or adversely modify their critical habitats. Id. § 402.14(g). At the conclusion of formal consultation, NMFS issues a biological opinion assessing the effects of the action and making a formal determination regarding whether the action is likely to "jeopardize the continued existence of" the species or adversely modify their critical habitats. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(e),(h).

ESA regulations define "jeopardize the continued existence of" as, "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. These regulations also define "destruction or adverse modification of critical habitat" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." 50 C.F.R. § 402.02.30.

Importantly, and highly pertinent to this question from Representative Dingell, a conclusion by NMFS that the proposed action is likely to jeopardize a listed species or result in adverse modification of its critical habitat does not automatically prevent that action from proceeding. Instead, the ESA and its implementing regulations provide a way for the action to proceed with certain modifications. Thus, in the case of oil and gas activity in the Gulf of Mexico that has the potential to jeopardize any ESA-protected species, NMFS can propose "reasonable and prudent alternatives" (RPAs) to the action that will allow the activity to go forward in some fashion, while avoiding jeopardy, and also avoiding adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3); 50 C.F.R. §§ 402.02, 402.14(h)(2). In addition, the ESA allows the government to consider the economic impact of designating critical habitat for any listed species. 16 U.S.C. § 1533(b)(2).

Following a determination that a particular activity is likely to jeopardize a species listed as protected under the ESA, the action agency and the consulting agency develop these "reasonable and prudent alternatives" to proposed actions by negotiating among themselves. Through this process, the agencies often are able to identify measures that reduce or eliminate the harm to species, while allowing the activity to move ahead. Many times, these RPAs are the result of expert biologists working to come up with different solutions to modify activities and to develop mitigation that protects the species in question. As an example of the kinds of measures negotiated among government agencies (at both the state and federal level) as a way to protect endangered species, there are boating speed limits for ESA-manatees, which allow recreational boating and fishing to proceed in areas frequented by those manatees. Similarly, the government has established various nesting beach protection and low-lighting mandates in order to protect sea turtles that are listed as threatened or endangered under the ESA, while still allowing beachfront properties and hotels to operate.

In addition, with respect to designation of critical habitat, the ESA authorizes the government to consider potential economic effects. This provision allows the government to consider whether protecting certain areas could result in adverse economic consequences. As a result, both the U.S. Fish and Wildlife Service and the National Marine Fisheries Service typically scrutinize the economic impacts of potential critical habitat designations.

As relevant for Lease Sale 261, NMFS issued a Biological Opinion in 2020 that was designed to analyze whether the next 50 years of federally authorized oil and gas activities on the outer continental shelf in the Gulf of Mexico would jeopardize the continued existence of any threatened or endangered species. That Biological Opinion concluded that, without mitigation, these oil and gas activities would jeopardize the survival and recovery of the critically endangered Rice's whale. NMFS then established a "reasonable and prudent alternative" that in its view would prevent jeopardy to the whale by placing a 10-knot speed limit and other related restrictions on oil and gas-related vessel traffic in that particular part of the Gulf of Mexico the Service then considered to be the whale's habitat. Several conservation groups challenged this RPA approach as insufficient to avoid jeopardy to Rice's whale.

During the pendency of this litigation, peer-reviewed scientific evidence emerged demonstrating that Rice's whales "persistently occur" throughout the northern Gulf of Mexico in waters 100–400 meters deep and were therefore at far higher risk than the Service considered them to be in the 2020 Biological Opinion. As a result of this new evidence, the government sought to reinitiate Endangered Species Act formal consultation on the 2020 Biological Opinion. The parties to the litigation then entered into a mediated settlement discussion regarding how best to protect whales while this new consultation process went forward. During that same period, the Service also proposed new critical habitat for Rice's whales in an area along the continental shelf break in the Gulf. 88 Federal Register 47453-47472 (July 24, 2023). In determining this critical habitat, the Service considered the possible resulting economic effects and explained its reasoning for delineating the scope of the area covered. 88 Federal Register at 47463-47466.

As a result of this mediated settlement discussion over the 2020 Biological Opinion, the court has recently approved a Stipulated Agreement that would allow

the government (BOEM and NMFS) to apply new science to the protection of the critically-endangered Rice's whale, while establishing certain restrictions on the scope of Lease Sale 261. These restrictions would include extending protections within the new critical habitat proposed by the government on July 24, 2023. When the government turned to applying these protections to Lease Sale 261, it allowed approximately 92% of the original area proposed for that sale to remain open for oil and gas exploration and development. This decision-making process is fully in keeping with the careful approach authorized under the ESA, which endeavors to protect listed species, while also allowing for significant commercial activities to proceed. If followed, it will be another example of the way in which the purposes of the ESA can be achieved, and endangered species can be protected, without either shutting down or collapsing affected commercial activity.

Thank you again for this opportunity to respond to the questions from Subcommittee Ranking Member Huffman and Representative Dingell.

Mr. BENTZ. Thank you, Mr. Roady. The Chair recognizes Mr. Robert Beal, Executive Director of the Atlantic States Marine Fisheries Commission in Arlington, Virginia.

Mr. Beal, you are recognized for 5 minutes. I remind you to please speak directly into the microphone, like within 1 inch from your mouth, please.

[Laughter.]

Mr. BENTZ. I am not joking. We can't hear you up here, and that is no good, if you are a witness and we can't hear you. So, please.

Mr. BEAL. I will keep leaning in, and let me know if I need to get closer.

STATEMENT OF ROBERT E. BEAL, EXECUTIVE DIRECTOR, ATLANTIC STATES MARINE FISHERIES COMMISSION, ARLINGTON, VIRGINIA

Mr. BEAL. Good afternoon, Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee. My name is Bob Beal, I am the Executive Director for the Atlantic States Marine Fisheries Commission.

ASMFC is an interstate compact of the 15 East Coast states, and manages 27 species of near-shore migratory finfish and shellfish species. The Commission manages some of the East Coast's most productive and economically important and iconic fisheries. It is my pleasure to be here today to comment on H.R. 5103, the FISHES Act.

As I just mentioned, I work for 15 Atlantic coastal states. And to get that group of diverse states to agree on anything is no small feat. But however, in this instance, those member states unanimously support any effort to accelerate the distribution of disaster assistance to fisheries participants.

Timely distribution of fishery disaster funding is critical to maintaining the economic viability of coastal communities. In addition to direct assistance to fishery participants in their communities, disaster assistance can be used to prevent future failures and restore affected fisheries.

Fisheries can be very fragile. Stocks we manage are impacted by numerous natural and anthropogenic events that result in fishery declines. Fishery disasters impact vessel owners, crews, dealers, processing facilities, subsistence harvesters, ports, tourism, restaurants, and so on down the line.

In 1996, Congress amended the Magnuson-Stevens Fishery Conservation and Management Act to develop a process for providing fishery disaster assistance to fisheries participants in their communities. There have been 136 disaster requests submitted to the Secretary of Commerce. Of those requests, 103 have been approved, 16 have been declined, and 11 are still pending Secretarial decision. Of the pending requests, the Hurricane Sally disaster request was submitted nearly 3 years ago, and still is awaiting Secretarial determination.

The Secretarial determination period can vary from a couple of months to multiple years with no timing requirements in the statute. The current fishery disaster program is a lengthy, multi-step process that involves gubernatorial or tribal requests, Federal data analysis, Secretarial review, congressional appropriation, followed by a state spend plan development and a review by NOAA Fisheries and the Office of Management and Budget. And after all those steps, finally, money is able to be distributed to those in need after a fishery disaster.

The 117th Congress passed the Fishery Resource Disaster Improvement Act, or FReDI, which made numerous improvements to the disaster assistance program. FReDI put timelines on NOAA to distribute funding and make decisions for stakeholders after the appropriation from Congress. One thing worth noting is that FReDI did not put a timeline on the OMB to approve spend plans. The FISHES Act aims to rectify this source of delays.

There are multiple examples of fisheries disasters where participants didn't receive assistance until years later. The timeline stands in contrast to the much faster assistance programs in other industries, such as agriculture. Farmers get rapid assistance through insurance, direct payments, low-interest loans, cost share programs, all of which are either under-developed or completely non-existent for fisheries.

As a recent example, the 4-year process to distribute funds following the 2019 Atlantic herring disaster up in the Northeast resulted in a number of observations from our member states. They noted that multiple entities defaulted on loans, including vessel owners and dealers; there were multiple crew layoffs; crews needed to leave the East Coast and move to the West Coast to find work; 150-year-old companies and family operations had to close their doors due to lack of funding.

The worst part about the delays in funding is that often the assistance only reaches stakeholders after they left the industry, sold their boat or businesses or, in some cases, even passed away. Our stakeholders need a better support mechanism following a fishery disaster.

Climate change is resulting in substantial changes in fisheries distribution and productivity, as well as increased natural disasters. Also, the rapid development of offshore wind projects along the Atlantic Coast will have impacts on fisheries that are not fully understood. These factors are likely to increase the frequency of fisheries disasters and the need for an effective disaster assistance program.

Our stakeholders can't wait multiple years for lifelines. The FISHES Act is a step forward in addressing regulatory hurdles by

placing a 30-day decision requirement on OMB to either approve or deny state spend plans, which this step has taken up to a year in past examples. This change will shorten the timeline in an effort to make the relief funds relevant to the stakeholders who have suffered economic losses.

ASMFC also supports removing the OMB state spend plan review from the process, and allowing NOAA Fisheries to provide the final approval of state spend plans. For this reason, ASMFC and member states supports the FISHES Act.

And thank you for your time, and I am happy to answer any questions.

[The prepared statement of Mr. Beal follows:]

PREPARED STATEMENT OF ROBERT E. BEAL, EXECUTIVE DIRECTOR, ATLANTIC STATES MARINE FISHERIES COMMISSION

ON H.R. 5103

Chairman Bentz, Ranking Member Huffman, and members of the subcommittee, thank you for the opportunity to testify on H.R. 5103, the Fishery Improvement to Streamline untimely regulatory Hurdles post Emergency Situation Act, or the FISHES Act, introduced by Representative Donalds.

My name is Bob Beal, I am the Executive Director of the Atlantic States Marine Fisheries Commission, which I will refer to as "ASMFC". ASMFC is a Compact of the 15 Atlantic coastal states which manages nearshore migratory marine fisheries occupying multiple states' waters from zero to three miles offshore. In 1942, the 77th U.S. Congress approved ASMFC's Compact and in doing so, recognized the need to manage our fisheries as a shared, collective resource for all public benefit. We were granted management authority in 1984 and 1993 through the Atlantic Striped Bass Conservation Act[1] and the Atlantic Coastal Fisheries Cooperative Management Act.[2] Today, the Commission manages 27 of the East Coast's most productive, economically important, and iconic fisheries, nine of which are cooperatively managed with our federal partners at NOAA Fisheries.

Our member states are supportive of any effort to accelerate the distribution of disaster assistance to fishery participants. Timely distribution of fishery disaster funding is critical to maintaining the economic viability of fisheries that are an essential part of coastal communities. These fisheries provide subsistence for countless individuals and are the keystones of economies in many rural locations. In addition to direct assistance to fishery participants and their communities, disaster assistance can be used to prevent future failures and restore affected fisheries.

Fisheries can be a fragile resource. The stocks we manage are impacted by numerous natural and man-made events beyond our control that cause population declines. The impacts of those declines have a ripple effect beyond just those on the boats. Closures and decreases in access to fisheries caused by events such as oil spills, hurricanes, and fishery failures have impacts on vessel owners, crews, processing facilities, ports, tourism, and restaurants. There are numerous examples of this economic keystone failing, and participants not receiving assistance until years later. This timeline stands in contrast to much faster assistance programs for other industries such as in agriculture.

Since the fisheries disaster program was initiated there have been 136 disaster requests submitted to the Secretary of Commerce. Of those requests, 103 have been approved, 16 denied, two partially approved, three withdrawn, one undetermined, and 11 pending. Of the pending requests, the Hurricane Sally disaster request was submitted nearly 3 years ago with no determination (NOAA Fisheries, 2023). This Secretarial determination period can vary from a couple of months to multiple years with no timing requirements in statute.

In 1996 Congress amended the Magnuson-Stevens Fishery Conservation and Management Act[3] (or MSA) to develop a process for giving ad hoc assistance to commercial fishery participants, tribal subsistence fishery participants, charter boats, headboats, and processers, who have experienced significant economic losses due to unforeseen events. The MSA states that to provide assistance, a disaster declaration

[1] 16 U.S.C. § 5151
[2] 16 U.S.C. § 5101
[3] 16 U.S.C. § 1861

must be requested by an eligible entity, there needs to be a positive determination, and declines must be due to an allowable cause. All of those terms are defined by NOAA below.

> "A request for a fishery resource disaster determination is generally made by the Governor of a State, an official resolution of an Indian Tribe, or other comparable elected or politically appointed representative as determined by the Secretary of Commerce (Secretary). The Secretary may also initiate a review at their own discretion" (National Oceanic and Atmospheric Association, 2023)

> "Upon receipt of a request for a fishery disaster determination, the Secretary will conduct a review of the best scientific information. Such review may include an analysis of the following factors: fishery characteristics, stock assessment, estimates of mortality, and overall effects in order to assess the existence of a fishery resource disaster and the cause(s) of the disaster. The review should be conducted in consultation with the affected State(s), and should consider such information and supporting data as the State(s) provide" (Kelly Denit, NOAA Fisheries, 2021)

> "Under MSA 312(a), the allowable causes for a fishery resource disaster are natural causes; undetermined causes; or, man-made causes beyond the control of fishery managers to mitigate through conservation and management measures, including regulatory restrictions (including those imposed as a result of judicial action) imposed to protect human health or the marine environment. Regulatory or judicial actions do not constitute "man-made" causes, except where imposed to protect human health or the marine environment." (Kelly Denit, NOAA Fisheries, 2021)

At the end of the 117th Congress, the Fisheries Resource Disasters Improvement Act,[4] or FReDI, was passed. Amendments made to MSA through this act put timelines on NOAA to distribute funding to stakeholders after appropriation from Congress. FReDI also eliminated an alternative avenue for fisheries disaster determination by removing section 308 from the Interjurisdictional Fisheries Act.

Here is a step-by-step timeline of the improved process:

1. An eligible entity (e.g Governor, Tribal representative, or other qualified applicant) requests a fishery disaster determination from the Secretary of Commerce.
2. The National Marine Fisheries Service conducts an evaluation to determine whether a qualifying fishery disaster has occurred.
3. The Secretary makes a determination based upon the evaluation and notifies the requestor of the determination.
4. If the determination is positive, Congress can appropriate funds for fishery disaster relief on an ad hoc basis.
5. If Congress appropriates fishery disaster relief funds, NOAA works with the affected parties to distribute the funds consistent with the statutory requirements and conditions of the appropriation. (Kelly Denit, NOAA Fisheries, 2021)
    a. Within 14 days, NOAA coordinates with OMB to determine the allocation of funds
    b. Within 120 days, States create and submit spend plans to NOAA
    c. Within 90 days, NOAA approves the spend plan and submits it to OMB for approval
    d. OMB approves the spend plan (with no timing requirement)
    e. State receives approval to spend funds in accordance with their approved spend plan

Relief funding is often disbursed through the interstate fisheries commissions, including ASMFC. When we are asked to distribute funds to affected stakeholders, we work as quickly as possible to do so. The Fisheries Resource Disasters Improvement Act made significant improvements in the timeline for disaster relief distribution, however, it did not explicitly state that OMB must also comply with the new timelines. In the past, OMB has taken up to a year to approve spend plans, proving to be a significant gap in the law.

[4] 16 U.S.C. § 1861a(a)

Comparisons between fisheries disaster support systems and those for the agriculture industry are, surprisingly, apples to oranges. Both industries are the bedrock of rural economies and both experience production and economic losses in similar ways. The difference in support stems from key infrastructure differences. Farmers get assistance through insurance, direct payments, low-interest loans, and cost-share programs, all of which are underdeveloped or non-existent for fisheries. (Stubbs, 2023) These systems are especially needed in the time immediately after a disaster has occurred.

The FISHES Act is a step forward in addressing regulatory hurdles for fisheries. FISHES puts a 30-day decision requirement on OMB to deny/approve a State's spend plan. OMB must work within NOAA's broader 90-day spend plan approval timeline to comply.

The 2019 Atlantic herring disaster impacted the greater Atlantic region after there were low levels of reproduction. The stock was not overfished nor experiencing overfishing. The positive disaster determination came in late 2021 and funds finally reached the hands of those impacted in 2023, 4 years after the disaster had occurred. This had dire consequences for individuals and businesses participating in the herring fishery.

Our member States have shared personal anecdotes about the impacts delays after the herring disaster had on their communities. In summation, we've heard about:

- Multiple entities defaulting on loans (vessel owners and dealers)
- Crew layoffs
- Crew needing to find work elsewhere, moving to the West Coast to do so
- Companies 150 years old and family operations closing their doors

The worst part about the delays is that often the assistance only reaches stakeholders after they've left their industry, sold their boat, or in some cases, passed away. Our stakeholders need better support mechanisms, and any effort that can be made toward this end goal is appreciated. This includes efforts made to remove or put restrictions on OMB's role in the process.

Climate Change is resulting in increased uncertainty with natural disasters becoming more and more common. It's also leading to substantial changes in fisheries distribution and productivity. These climate-induced changes are likely to increase the frequency of fishery disasters and the need for effective disaster assistance programs. To better predict and reduce the fishery disasters resulting from climate change, fishery managers will rely on a robust fishery data collection and analysis program. Congress will need to provide resources to the states and NOAA Fisheries to support effective fisheries monitoring programs.

Also, the rapid development of offshore wind projects along the Atlantic coast will have impacts on fisheries that are not yet fully understood. The cumulative impacts of fisheries displacement and the potential changes to larval disbursement, caused by development, could create a future need for fishery disaster support.

Our stakeholders can't wait years for lifelines. The FISHES Act would help shorten this timeline in an effort to make the relief funds relevant to the stakeholders who have suffered. By imposing a strict timeline on the Office of Management and Budget, acknowledging their role in the delays, and adding transparency to the process, this bill is a step forward in improving the process and timing of distributing assistance to those impacted by fisheries disasters. This bill would help fishery participants weather fishery disasters, retain fishery infrastructure, and increase the likelihood of sustained economic viability of a centuries-old way of life in our country.

For these reasons, ASMFC is supportive of the bill. Thank you again for your time. I welcome any questions you have.

Mr. BENTZ. Thank you.

The Chair recognizes Mr. Jonathan Wood, Vice President of Law and Policy at the Property and Environment Research Center in Bozeman, Montana.

Mr. Wood, you are recognized for 5 minutes.

STATEMENT OF JONATHAN WOOD, VICE PRESIDENT OF LAW AND POLICY, PROPERTY AND ENVIRONMENT RESEARCH CENTER, BOZEMAN, MONTANA

Mr. WOOD. Thank you, Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee. Thank you for the invitation to participate in this afternoon's discussion of numerous important bills.

My remarks will focus on H.R. 5504, in particular, the blocking of two proposed regulations from the Fish and Wildlife Service and the National Marine Fisheries Service. Those proposed regulations would set back species recovery by undermining incentives for habitat restoration and proactive conservation efforts.

I am Jonathan Wood with the Property and Environment Research Center, the national leader in market solutions for conservation. Through research, law and policy, and innovative conservation projects, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife.

On the 50th anniversary of the Endangered Species Act, we are falling far short of its ultimate goal of recovering species. True, we have been successful at a key part of that goal: preventing extinction so that recovery remains possible. Impressively, less than 1 percent of listed species have been declared extinct under the Act to date. However, only 3 percent of listed species have recovered, and only 4 percent are even improving, according to the Fish and Wildlife Service. Those poor recovery results are far below our expectations. According to PERC's research, the Service predicted the recovery of 300 species by now. Only 11 of those species have actually recovered.

Last month, PERC released a Field Guide to Wildlife Recovery, which has dozens of ideas for how to recover more species through better incentives for habitat restoration and proactive conservation effort. The report covers a wide range of reform ideas, including making recovery planning more effective, reducing conflict over species reintroductions, and rewarding Federal agencies, states, and landowners for progress toward recovery.

Today, I will focus on two of those ideas, and how recently-proposed regulations move us in the opposite direction, stoking conflict while undermining conservation incentives.

The first concerns the regulation of threatened species. The ESA provides more stringent regulation of endangered species and threatened ones. Congress' decision to tailor regulations for threatened species makes imminent sense. If regulations were lax as species recover, states and landowners have an incentive to work toward that recovery. On the other hand, if regulations tighten should a species decline, they have a really strong incentive to prevent that result, too. In our field guide, PERC recommends enhancing these incentives by designing threatened species regulations as what we call roadmaps to recovery.

For species like the lesser prairie chicken, this would mean a roadmap, or this would mean setting incremental recovery targets for the species, and gradually reducing the extent and stringency of Federal regulation. The idea is constantly be providing some degree of regulatory relief in exchange for direct and meaningful

progress toward recovery. This way, states and landowners have a direct incentive to make continual progress toward recovery.

Needless to say, this is not the approach the Service took in its controversial regulation for the lesser prairie chicken, but it is an important and often missing opportunity.

The Biden administration recently proposed a blanket rule under which threatened species would automatically be regulated as if they were endangered. It would do so without considering whether that is the best approach for each threatened species. This scientific and illegal rule would undermine recovery by making states and landowners indifferent to whether species are improving or declining. From the perspective of the regulated community, this rule would mean it does not matter whether species are endangered and threatened, and that is the wrong approach.

Ironically, the Biden administration's own actions show that the blanket rule would be bad for species. Under current policy, the Service tailors regulations for the unique needs of each species, and could impose endangered-level regulation for a species if that were the right fit. To date, the Administration has rejected that approach for every single animal it has listed as threatened. Yet, it now proposes a blanket policy which would impose an approach it consistently rejects when it actually considers what is best for species.

The second idea from PERC's field guide that I want to discuss is better incentives for habitat restoration. Currently, the main tool for this under the ESA is Designation of Critical Habitat, but this is far from a perfect tool. Indeed, the Service's Director, Martha Williams, has previously written that critical habitat designations "have very little impact, from a conservation perspective."

To have a better impact, incentives must be directly addressed in the designation process. We must avoid designations that impose large burdens while providing little benefit to species, as happened with the dusky gopher frog. In those cases, other tools are needed to encourage habitat conservation and restoration.

Unfortunately, the Service recently proposed regulations that would ignore whether a critical habitat designation will contribute to a species recovery or whether a designated area has the features species need to thrive. Doing so would be a step backward that would again ignore the incentives needed for habitat restoration. Blocking these proposed regulations is an important step, but ultimately more must be done if we are going to do better at recovering species in the ESA's second half-century than we have done in its first.

PERC has lots of ideas about how to provide those better incentives for states and private landowners, and I look forward to discussing them with you during your questions. Thank you.

[The prepared statement of Mr. Wood follows:]

PREPARED STATEMENT OF JONATHAN WOOD, VICE PRESIDENT OF LAW AND POLICY, PROPERTY AND ENVIRONMENT RESEARCH CENTER (PERC)

ON H.R. 929

Main Points

- Although the Endangered Species Act has been effective at preventing extinctions, only 3% of listed species have achieved its ultimate goal of recovery. The key to recovering more species is to encourage habitat restoration and other proactive conservation efforts. To do so, ESA regulations must better align the incentives of states and landowners with the interests of imperiled species.
- Instead, the Fish and Wildlife Service has proposed to regulate threatened species as if they were endangered, making states and landowners indifferent to whether species are improving or declining.
- The Service has also proposed to increase conflict over critical habitat by ignoring whether designations contribute to recovery and whether designated land has the features species need to flourish.
- Blocking these proposals is a step in the right direction, but more is needed to deliver on the ESA's promise of recovering species.

Introduction

Chairman Bentz, Ranking Member Huffman, and members of the committee, thank you for the invitation to participate in this afternoon's discussion. While this hearing concerns numerous bills, my remarks will focus on the Endangered Species Act, proposed threatened-species and critical-habitat regulations that would set back species recovery, and H.R. 5504's proposal to block those counterproductive regulations.

The "ultimate goal" of the Endangered Species Act is to recover species to the point that they are no longer threatened with extinction.[1] The ESA has been effective at achieving part of this goal, preventing extinction so that it is possible to recover species. Although 32 species have tragically been declared extinct,[2] 99% of listed species persist to this day. However, disappointingly few species have recovered (3%)[3] or are improving (4%).[4]

The reason for the dearth of recoveries is poor incentives for habitat restoration and other proactive recovery efforts. To fix this, PERC released last month *A Field Guide for Wildlife Recovery* that explores how ESA implementation could be strengthened to deliver on the law's promise of recovery.[5]

Unfortunately, the Fish and Wildlife Service has recently proposed regulations that would worsen recovery incentives and set back species conservation. One of these regulations proposes to automatically impose on threatened species the prohibitions Congress designed for endangered species, without regard to the unique needs of each species and the best approach to encourage its recovery. Another would stoke conflict and distract from conservation by eliminating requirements that the Service consider whether an area designated as critical habitat will contribute to a species recovery and contains the features species need to flourish. Blocking these rules, as H.R. 5504 would, is a positive step to improve recovery incentives. But more is needed to fully realize the ESA's potential. I urge the Committee to consider additional reforms, like those proposed in PERC's *Field Guide*, to spur habitat restoration and proactive recovery efforts and make species an asset rather than a liability.

The Property and Environment Research Center

PERC is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

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[1] U.S. Fish & Wildlife Serv., *ESA Basics: 50 Years of Conserving Endangered Species* (2023).

[2] *See* U.S. Fish & Wildlife Serv., Press Release, *Fish and Wildlife Service Delists 21 Species from the Endangered Species Act due to Extinction* (Oct. 16, 2023); ECOS, Delisted Species (last visited Oct. 19, 2023).

[3] *See* Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC (2023).

[4] *See* Department of the Interior, *2017/2018 Annual Performance Plan & 2016 Report* 15 (May 26, 2017).

[5] *See* PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It* (2023).

Through research, law and policy, and innovative applied conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. PERC and its affiliated scholars have long studied the ESA and how it could be better implemented to empower states to lead in recovering species, to remove perverse incentives that set species back, and to create the positive incentives needed to spur habitat restoration and proactive recovery efforts.[6]

The Unfulfilled Promise of Recovery

The purpose of the ESA is to "conserve" listed species and their habitats, with conservation defined explicitly in recovery terms.[7] This recovery mandate is reflected in every significant provision of the act.[8] Consequently, there is broad agreement that the act's goal is "in a word . . . recovery," as Michael Bean once put it.[9] But we are not recovering species at the rate we should be. Over the last 50 years, only 3% of species have recovered.[10] Using newly compiled Fish and Wildlife Service data, a recent PERC study found that the Service predicted the recovery of 300 species by now, but scandalously few of those species have actually recovered.[11] Indeed, the recovery rate for species predicted to recover by now—species which should be easier and quicker to recover than average—is little better than the rate for all listed species (4% v. 3%).[12] Nor are we likely on the verge of a dramatic increase in the recovery rate. According to the most recent data from the Service, only 4% of species are even improving and, therefore, on the road to recovery.[13]

The lack of progress toward species recovery should alarm all of us concerned with wildlife conservation. But entrenched political conflict distracts us from focusing on recovery and finding ways to better deliver on the ESA's promise. Ultimately, wildlife pays the price for this conflict. Species that don't improve and recover are left perpetually on the precipice of extinction. For instance, there are only 135 dusky gopher frogs left at six sites in Mississippi.[14] Without habitat restoration and proactive recovery effort, the species will remain extremely vulnerable to drought and floods that could damage its little remaining habitat and cause its extinction.[15]

But the current approach to implementing the ESA does not adequately encourage habitat restoration and proactive conservation. The Fish and Wildlife Service has made little progress in implementing recovery plans.[16] States have limited flexibility to innovate.[17] And heavy-handed regulations discourage landowners from restoring habitat or, worse, encourage them to preemptively destroy habitat before it can attract a species and the regulations that accompany it.[18]

To boost species recovery, we need better incentives for federal officials, states, tribes, and private landowners to restore habitat and invest in proactive conservation. That is the key challenge we face in the ESA's second half-century. PERC's *Field Guide for Wildlife Recovery* offers dozens of ideas for how to do this, including making recovery planning more effective, reducing conflict over reintroduction efforts, and rewarding federal agencies, states, and landowners for progress toward

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[6] *See Field Guide, supra* n. 5; *Missing the Mark, supra* n. 3; Jonathan Wood & Tate Watkins, *Critical Habitat's "Private Land Problem": Lessons from the Dusky Gopher Frog*, 51 Envtl. L. Rep. 10,565 (2021); Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Policy Report (2018).

[7] 16 U.S.C. §§ 1531(b), 1532(3) (defining conservation as bringing listed species "to the point at which the measures provided pursuant to this chapter are no longer necessary").

[8] *See* 16 U.S.C. §§ 1532(5) (definition of critical habitat), 1533(d) (standard for threatened-species regulations), 1533(f) (standard for recovery plans), 1534 (standard for land acquisition), 1535 (standard for collaborating with states), 1536 (standard for inter-agency consultation), 1539(j) (standard for establishing experimental populations).

[9] *See* Michael J. Bean, *The Endangered Species Act: Science, Policy, and Politics*, in The Year in Ecology and Conservation Biology, Annals of the New York Academy of Science (2009).

[10] *See Missing the Mark, supra* n. 3.

[11] *See id*.

[12] *See id*.

[13] *See Performance Plan, supra* n. 4 at 15.

[14] *See Field Guide, supra* n. 5 at 22-23.

[15] *See id*. at 22-25.

[16] *See Missing the Mark, supra* n. 3. Recovery plans may also not correctly anticipate what species need to recover, as recovered species have on average completed or partially completed only 28% of the actions described in their recovery plans. *See id*.

[17] *See Field Guide, supra* n. 5 at 26-29.

[18] *See id*. at 44.

recovery. Unfortunately, the proposed rules we're discussing today do the opposite, stoking conflict while undermining recovery incentives.

A Cookie-Cutter Approach Where Creativity is Needed to Encourage Recovery

In June, the Service proposed to restore the so-called "blanket rule" under which the Endangered Species Act's regulations for endangered species would automatically apply to threatened species as well.[19] This would replace the current approach of tailoring regulations to the unique needs of each threatened species.[20] The unscientific blanket rule is a failed approach to regulating threatened species. Restoring it would undermine incentives to recover species.

When Congress enacted the ESA, it intentionally limited the take prohibition and other Section 9 prohibitions to endangered species. It did so, according to the bill's Senate floor manager, John Tunney (D-CA), to "minimiz[e] the use of the most stringent prohibitions," which Congress believed should "be absolutely enforced only for those species on the brink of extinction."[21] For threatened species, Congress gave the Service "an almost infinite number of options" to "facilitate regulations that are tailored to the needs of the animal."[22] In other words, Congress expected threatened species regulations to be designed creatively to facilitate recovery.

From 1975 to 2019, however, the Service followed a cookie-cutter approach. Under the so-called blanket rule, which purported to overrule Congress' decision to regulate endangered and threatened species differently,[23] the Service automatically imposed on threatened species all of the prohibitions that apply to endangered species.[24] It could set that rule aside and tailor a rule to the needs of a particular animal. But, because it was procedurally more burdensome to craft a tailored rule than reflexively apply the blanket rule, tailored rules were the rare exception. For 75% of species listed as threatened during that time, the blanket rule was applied without any analysis of whether that was best for the species.[25] Indeed, the blanket rule caused Service personnel to treat a species' status upgrade as a non-event, with one official downplaying improvements for the Florida manatee by asserting that it is a "misperception" that endangered and threatened are distinct classifications.[26]

This began to change during the Obama administration. It discarded the blanket rule in favor of tailored rules more than "nearly every other presidential administration," according to a Defenders of Wildlife report.[27]

PERC's research supported this policy shift because tailored rules encourage species recovery by aligning the incentives of landowners with the interests of species.[28] Regulating threatened species less stringently than endangered species gives states and landowners a stake in a species' status. It does so through the promise that recovering the species to the point that its status can be upgraded will be rewarded with regulatory relief. Likewise, efforts to prevent a threatened species' further slide are motivated through the implicit threat that, if the species is downgraded, it will trigger more burdensome regulation.

The Trump administration continued the shift in policy that began during the Obama administration and formalized it by rescinding the blanket rule in 2019. It did so to "incentivize conservation for both endangered species and threatened species."[29] Consistent with PERC's research, the Service explained that "[p]rivate landowners and other stakeholders may see more of an incentive to work on recovery actions" through the promise of "reduced regulation."[30] Under the 2019

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[19] *See* 88 Fed. Reg. 40,742 (June 22, 2023).

[20] *See* 84 Fed. Reg. 44,753, 44,757 (Aug. 27, 2019).

[21] *See* Congressional Research Service, A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 358 (statement of Sen. Tunney).

[22] *See* Congressional Research Service, *supra* n. 21, at 358.

[23] Congress did not give the Service this authority. Consequently, the blanket rule is and always has been unlawful. *See* Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23 (2015). *See also* PERC, Comment Opposing the Proposed Reinstatement of the "Blanket Rule" Regulating Threatened Species as if They Were Endangered 11 (Aug. 22, 2023).

[24] *See Field Guide, supra* n. 5 at 6-9.

[25] *See* 88 Fed. Reg. at 40,744.

[26] Patricia Sagastume, *Reclassifying Florida Manatees: From Endangered to Threatened*, Al Jazeera America (August 8, 2014) (quoting Patrick Underwood, a U.S. Fish and Wildlife Service spokesman, as saying "People have misperceptions that we have two lists. It's one classification.").

[27] *See* Ya-Wei Li, *Section 4(d) Rules: The Peril and the Promise*, Defenders of Wildlife White Paper 1 (2017).

[28] *See Field Guide, supra* n. 5 at 6-9. *See also Road to Recovery, supra* n. 6.

[29] 84 Fed. Reg. at 44,757.

[30] *See id*.

rule, every threatened species listing has been accompanied by a regulation tailored to the unique needs of that species.

Now, the Service proposes to reverse this decision and reinstate the blanket rule. Doing so would be a clear loss for species. As discussed above, few species improved and recovered while it was in place. In fact, only 29 domestic species progressed enough to be upgraded from endangered to threatened during the more than 40 years that the blanket rule was in place.[31] And, because of the blanket rule, states and landowners generally saw no reward even in the few cases where that progress was achieved. It is also notable that the National Marine Fisheries Service, which has never had a blanket rule, has done significantly better at recovering species under its care, achieving a 6.7% recovery rate compared to the Service's 2.5%.[32]

Ironically, the Biden administration itself has demonstrated that restoring the blanket rule would undermine species recovery. In implementing the 2019 rule, it has considered what regulation would best promote the conservation of each species it has listed as threatened. The administration could have imposed endangered-level regulation for any of them. But it has rejected that approach every time.[33] Instead, it has found tailored regulations better for species.[34] This is no coincidence. The National Marine Fisheries Service has found endangered-level regulation conducive to the conservation of threatened species only 3% of the time.[35] What this shows is that the blanket rule is almost never the right solution to promote the conservation and recovery of species. Yet the Service is not only proposing to reinstate the blanket rule but also made clear that it would no longer consider what approach would be best for each species before applying the blanket rule.[36]

At the same time that it was proposing to restore the blanket rule, the Biden administration was also committing not to apply it to reintroduced wildlife populations, which are treated as threatened under the ESA.[37] It will not do so, the Service explained, because "each situation is unique and requires careful consideration of what prohibitions may be necessary" to conserve each population.[38] One-size-fits-all approaches, the Service continued, do "not provide the flexibility that is needed to further the conservation of the species."[39] Of course, the same is true of threatened species generally, but the Service has not reconciled these contradictory positions.

Despite the importance of recovery and incentives to the ESA's text and the 2019 rescission of the blanket rule, the Service ignores those critical considerations in its proposal. It does not dispute the earlier determination that tailored rules produce better incentives for habitat restoration and other proactive recovery efforts. Instead, it explicitly confirms it.[40] The Service's notice does not mention private landowners, much less discuss how the blanket rule would affect the likelihood that they or states would invest in habitat restoration or other proactive conservation efforts.[41] The Service is, instead, ignoring the most important factors for assessing whether a regulation is "necessary and advisable for the conservation," i.e. recovery, of a species. Therefore, the proposed regulations violates the ESA.

Blocking the blanket rule by passing H.R. 5504 and restoring the ESA's original intent would help improve incentives to recover species. But that should be the beginning, not the end, of Congress' efforts to reform how threatened-species regulations are designed and implemented. To achieve the ESA's purpose, the Service

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[31] *See Missing the Mark, supra* n. 3. *See also* FWS, ECOS: Reclassified Species, https://ecos.fws.gov/ecp/report/species-reclassified. During this time, 10 domestic species also declined to the point that they had to be downgraded from threatened to endangered. But because there are significantly more species listed as endangered than threatened, the percentages are basically the same (2.4% threatened species downgraded to endangered v. 2.2% endangered species upgraded to threatened). *See* FWS, ECOS: Reclassified Species.

[32] *See* PERC, Comment Opposing the Proposed Reinstatement of the "Blanket Rule," *supra* n. 23 at 11. Of course, NMFS is responsible for fewer and different species than the Service, which may explain these results. But it's alarming that, in proposing to reinstate the blanket rule, the Service does not even consider NMFS' higher recovery rate or the role its tailoring of 4(d) rules may play in it. *See id*.

[33] *See Field Guide, supra* n. 5 at 8. *See also* 88 Fed. Reg. at 40,744.

[34] *See Field Guide, supra* n. 5, at 8.

[35] *See* Li, *supra* n. 26.

[36] *See* 88 Fed. Reg. at 40,747 ("If this proposal is finalized, . . . we will not make necessary and advisable determinations for the use of those blanket rules in future proposed or final listing rules.").

[37] *See* 88 Fed. Reg. 42,632, 42,645 (July 3, 2023).

[38] *See id*.

[39] *See id*.

[40] 88 Fed. Reg. at 40,747.

[41] *See* PERC, Comment Opposing the Proposed Reinstatement of the "Blanket Rule." *supra* n. 23.

must be nudged to use the flexibility Congress has given it to tailor regulations more creatively to improve conservation incentives and put more species on the road to recovery.

It likely will not do this on its own. Consider the lesser prairie chicken. When the Service proposed to list a population of that species as threatened, it proposed a regulation under the 2019 rule that would strictly regulate ranching. Conservation groups, including PERC, National Wildlife Federation, and the Nature Conservancy, opposed the proposed regulation because it would irrationally penalize landowners who were voluntarily conserving the species' grassland habitat.[42] Ultimately, the Service revised its proposal in response to this pushback. But, indicating its resistance to considering such incentives generally, it also disputed having any obligation to consider "the costs of [its] rules on landowners, assessment of previous conservation provided by landowners and other groups, and calculation of what incentives for conservation [its] rules provide."[43]

A diverse mix of experts and practitioners have urged the more creative tailoring of threatened-species regulations to support species conservation and recovery.[44] A few of those merit specific mention. Earlier this year, Professor Robert Fischman from Indiana University appeared as a minority witness before this subcommittee and testified to the potential for better tailored regulations for threatened species to promote more conservation.[45] In a forthcoming book chapter, David Willms of the National Wildlife Federation proposes a creative way to use threatened species regulations to facilitate the recovery of grizzly bear populations and reduce litigation over their future delistings.[46] And, in 2017, the Western Governors' Association issued recommendations for ESA reform including "greater distinction between the management of threatened versus endangered species in ESA to allow for greater management flexibility, including increased state authority for species listed as threatened."[47]

PERC's contribution to this debate has been to propose that threatened species regulations be designed as "roadmaps to recovery" for each species.[48] The regulation should set incremental recovery goals for the species, such as population targets, habitat restoration objectives, or other metrics, and provide for the extent or stringency of the regulation to automatically adjust as they are met. For a species like the grizzly bear, this could mean gradually transferring authority to the states as populations are reintroduced or rebound, thereby enabling states to build trust with the conservation community over their ability to manage the recovering population.[49] For a species like the American burying beetle, whose recovery depends on relocating beetles north in response to climate change, regulation might recede gradually as habitat is restored in the northern part of their range and as beetles

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[42] PERC, Comment on Proposed Lesser Prairie Chicken 4(d) Rule (Sept. 1, 2021); National Wildlife Fed'n, Comment on Proposed Lesser Prairie Chicken 4(d) Rule (Aug. 31, 2021); Turner Enterprises & Turner Endangered Species Fund, Comment on Proposed Lesser Prairie Chicken 4(d) Rule (Aug. 16, 2021); The Nature Conservancy, Comment on Proposed Lesser Prairie Chicken 4(d) Rule (Aug. 2, 2021).

[43] *See* 87 Fed. Reg. 72,674, 72,717 (Nov. 25, 2022).

[44] *See, e.g.*, Alejandro Camacho, et al., *Six Priority Recommendations for Improving Conservation Under the ESA*, 51 Envtl. L. Rep. 10,785, 10,788, 10,789-90 (2021) (listing better tailoring of 4(d) rules as a "key reform" identified in a dialogue among the conservation community hosted by UC Irvine School of Law and the Environmental Policy Innovation Center); Temple Stoellinger, et al., *Improving Cooper ving Cooperative State and F e State and Federal Species Conser al Species Conservation Efforts*, 20 Wyo. L. Rev. 183, 202-205 (2020) (describing improvements to the design of 4(d) rules as one of seven reform ideas to receive general agreement in a workshop of diverse stakeholders).

[45] *See* Testimony of Robert L. Fischman Before the Subcommittee on Water, Wildlife and Fisheries of the House Committee on Natural Resources, Hearing on Proposed Congressional Joint Resolutions Disapproving Rules Enacted under the Endangered Species Act (Apr. 18, 2023).

[46] David Willms, *Unlocking the Full Power of Section 4(d) to Facilitate Collaboration and Greater Species Recovery,* in THE CODEX OF THE ENDANGERED SPECIES ACT: VOLUME II: THE NEXT FIFTY YEARS, eds. Lowell E. Baier, John F. Organ, and Christopher E. Segal (Lanham, MD: Rowman & Littlefield, forthcoming 2023). *See also* Brian Yablonski, *A Path Forward for the Grizzly Bear*, PERC Reports (Oct. 17, 2023).

[47] Western Governors' Association, Policy Resolution 2017–11: Species Conservation and the Endangered Species Act (2017). States and organizations representing state officials also filed comments opposing the reinstatement of the blanket rule for these and other reasons. *See, e.g.*, Nat'l Ass'n of State Foresters, Comment on Proposed ESA Rules (Aug. 17, 2023); Comment of 18 States Opposing the Proposed Rule (Aug. 21, 2023).

[48] *See Field Guide, supra* n. 5 at 18-21.

[49] *See id*.

are relocated from the southern portion.[50] The key to this strategy is to set clear, objective recovery goals and provide frequent, incremental rewards (in the form of regulatory relief) as they are met, thereby encouraging states and private landowners to invest in habitat restoration and other conservation efforts.[51]

Beyond promoting species recoveries, the roadmaps to recovery approach would also help give effect to recovery plans, empower states to take the lead on recovery, and reduce the stakes of listing decisions.[52] These are critical because, currently, recovery plans have no binding effect and little progress has been made under them, states have been sidelined from their intended role in managing and recovering wildlife under the ESA, and persistent litigation has kept species on the list years past the point that they biologically recovered.[53] Although the Service already has the authority to use these innovative approaches, it is apparent that additional nudging from Congress will be required to make it seize those opportunities and recover more species.

The Conservation Costs of Poorly Conceived Critical Habitat Designations

The Service, along with the National Marine Fisheries Service, has also proposed changes to the critical habitat process that will stoke conflict while doing nothing to promote conservation. Limited habitat is one of the major threats causing species to be endangered or threatened. Therefore, conserving existing habitat and restoring additional habitat are critical to recover species. But the main provision of the ESA targeting habitat, the critical habitat provision, is an imperfect tool for these purposes. Indeed, Martha Williams, the Director of the Fish and Wildlife Service, has observed, in an article co-authored with other former Obama administration officials, that critical habitat designations "have very little impact" from a "conservation perspective."[54]

This is because designating land as critical habitat does not necessarily extend any sort of regulatory protection to habitat features on that land. Instead, a critical habitat designation only affects the use of designated land if that use happens to receive federal funding or require a federal permit, such as a "dredge and fill" permit under the Clean Water Act.[55] Otherwise, the landowner is as free to degrade or destroy habitat features after a designation as she was before.

Although a critical habitat designation does not necessarily mean a landowner's property will be regulated, a designation still affects them. Studies show that designations immediately and significantly reduce the value of designated land.[56] According to one study, for instance, critical habitat for the bay checkerspot butterfly reduced the value of undeveloped land by 78%.[57] This is because critical habitat designations have a "stigma effect." If a buyer were considering similar properties, one of which was designated, she would discount the amount she would pay for the designated property to reflect potential regulatory consequences in the future.[58]

To mitigate this risk, landowners may be perversely encouraged to preemptively destroy habitat features on their land.[59] One study of the critical habitat designation for a pygmy owl in Arizona, for instance, found that parcels proposed for designation were developed faster than equivalent tracts outside of it.[60] This is a serious problem because 80% of listed species rely on private land, most of them for the majority of their habitat.[61]

Because critical habitat designations harm landowners but do not necessarily benefit species, it is critical that they be done carefully and with the incentives of landowners in mind. However, this has often not been the case. For the dusky gopher frog, for instance, the Service designated 1,500 acres of private land in

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[50] *See* PERC, Comment Opposing the Proposed Reinstatement of the "Blanket Rule", *supra* n. 23 at 7.
[51] *See* Field Guide, *supra* n. 5 at 18-21.
[52] *See id*.
[53] *See id*.
[54] *See* David J. Hayes, Michael J. Bean, Martha Williams, *A Modest Role for A Bold Term: "Critical Habitat" Under the Endangered Species Act*, 43 Envtl. L. Rep. 10,671, 10,672 (2013).
[55] *See Field Guide, supra* n. 5 at 22-25. *See also* Wood & Watkins, *supra* n. 6.
[56] *See Field Guide, supra* n. 5 at 22-25.
[57] Maximillian Aufhammer et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 Land Econ. 188 (2020).
[58] *See* Wood & Watkins, *supra* n. 6.
[59] *See id*.
[60] John A. List, Michael Margolis, & Daniel E. Osgood, *Is the Endangered Species Act Endangering Species?*, NBER Working Paper 12777 (2006).
[61] Fish and Wildlife Service, *Our Endangered Species Program and How It Works with Landowners* (2009) (estimating that private landowners provide 80% of habitat for listed species).

Louisiana as critical habitat despite the land lacking the habitat features the frog needs to thrive.[62] The land would aid the frog's recovery only if the existing forest were chopped down and replaced with a different forest type, if the property were regularly burned to limit understory growth, if an ephemeral pond were managed for the frog's benefit, and if frogs were introduced.[63] Based on the Nature Conservancy's efforts to restore dusky gopher frog habitat on its own property in Mississippi, this would be an incredibly difficult and expensive undertaking.[64] But the designation provided no incentive for the landowner to do any of these things; instead, it alienated them and provoked a conflict that ensured these recovery efforts would never occur.[65]

Currently, whenever land that is not occupied by a species is considered for critical habitat, regulations require a determination that "the area will contribute to the conservation of the species."[66] This means that the Service must consider how the designation will affect the likelihood that any existing habitat features on the property will be conserved or if habitat features will be restored. This is a critical consideration that determines whether a designation will help or hinder a species' recovery. Unfortunately, the Service recently proposed to eliminate this requirement. Worse, it offered no explanation for this proposal. Instead, its explanation focuses exclusively on other proposed changes to the regulation containing this requirement.[67] The inevitable consequence of this proposal, if it is finalized, will be designations that undermine habitat conservation and restoration by alienating landowner partners and by creating perverse incentives.

For that reason, PERC's research recommends reforming the ESA's critical habitat provisions to explicitly require consideration not only of economic costs, as is currently required, but also the "conservation costs" of designations, such as where designations discourage landowners from conserving or restoring habitat.[68] In practice, this would mean that the Service would prioritize the designation of federal land over private land, as it has repeatedly acknowledged is more effective.[69] It would also mean that land occupied by a species would continue to be prioritized over unoccupied lands.[70] And it likely means that lands currently unsuitable for a species would virtually never be designated.[71]

That last point might surprise. If restoring habitat is essential to recover species, why shouldn't critical habitat designations encompass areas where that restoration could occur? Based on this sort of reasoning, the Service has proposed to eliminate a requirement that unoccupied lands have one or more of the physical or biological features essential to a species' conservation.[72] But designating land that could be restored as habitat does not mean that it will be. Instead, the opposite is more likely. It is likely that the designation would not affect the landowners' ability to ensure that the land never becomes habitat for the species. Even if a federal permit might be required to use the property, constitutional limits would forbid the government from conditioning that permit on creating habitat.[73] For this reason, the Supreme Court long ago recognized that the ESA's land acquisition authority, rather than critical habitat provisions, are the proper tool for conserving "land that is not yet but may in the future become habitat for an endangered or threatened species."[74]

Avoiding counterproductive critical habitat designations by blocking these proposals is an important step. But, again, it won't be enough to spur habitat

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[62] *See* Wood & Watkins, *supra* n. 5.
[63] *See id*.
[64] *See id*.
[65] *See Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv*., 139 S. Ct. 361, 368-69 (2018). Prior to my work at PERC, I was one of the attorneys that represented the private landowners before the Supreme Court.
[66] *See* 88 Fed. Reg. 40,764, 40,769 (June 22, 2023).
[67] *See id*. at 40,769-70 (discussing the removal of a requirement that unoccupied lands contain habitat features).
[68] *See Field Guide, supra* n. 5 at 25.
[69] *See id. See also* 81 Fed. Reg. 7,226, 7,231 (Feb. 11, 2016) (citing "the unique obligations that Congress imposed for Federal agencies in conserving endangered and threatened species" as reason to, "[t]o the extent possible, . . . focus designation of critical habitat on Federal lands").
[70] *See* Wood & Watkins, *supra* n. 6. *See also* Environmental Policy Innovation Center, *Endangered Species Act: 2018 Administrative Reform* 7 (2018) (finding that unoccupied land constituted only 1% of lands designated as critical habitat in the previous decade).
[71] *See Field Guide, supra* n. 5 at 25.
[72] *See* 88 Fed. Reg. at 40,769.
[73] *See* Wood & Watkins, *supra* n. 6 at 10,571. To its credit, the Service acknowledges this fact. *See* 88 Fed. Reg. 31,000, 31,001 (May 15, 2023) (discussing *Koontz, Dolan*, and *Nollan*).
[74] *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or*., 515 U.S. 687, 703 (1995).

restoration at the scale needed to recover species. Additional reforms are needed to encourage this effort. According to PERC's research, the best way to encourage habitat restoration is for conservation organizations, states, and the federal government to provide incentives to landowners for voluntarily undertaking this critical work.[75] Where restored habitat also provides other services, such as a wetland that supports wildlife but also improves water quality, existing regulatory programs can be improved to directly reward the restoration of those features.[76] Ultimately, we must heed Aldo Leopold's admonition that "Conservation will ultimately boil down to rewarding the private landowner who conserves the public interest."

Incentives Matter for Conservation

After 50 years, the ESA has achieved significant accomplishments, including avoiding the extinction of dozens or hundreds of species.[77] But we are falling far behind in achieving its ultimate goal of recovering species, with only 3% of species achieving this goal and a similarly small proportion making progress toward it. We must do better.

I encourage the members of this Committee to consider the dozens of recovery-focused reforms in PERC's *Field Guide for Wildlife Recovery*. In addition to improving regulations for threatened species and critical habitat, we explore how to address the large number of listed species that have no recovery plan and the limited progress in implementing plans for the species that have them.[78] We also discuss how to free up the Service to make science-based listing and delisting decisions by addressing the litigation that too often interferes with those decisions.[79] We propose restoring states to the role Congress originally intended, including taking the lead on implementing recovery actions and permitting.[80] We urge more populations to be established by reintroduction, while making those populations an asset to neighboring landowners and communities rather than a liability.[81] We analyze how agencies can be encouraged to use their authorities to advance the recovery of species, rather than the ESA being an obstacle to their work.[82] And, finally, we call for permitting reform so that landowners and conservation groups will face fewer obstacles to habitat restoration and on-the-ground conservation work.

The motivation for all of these ideas is to recover more species without sacrificing the ESA's effectiveness at preventing extinction. This is precisely what the ESA is intended to do. We do America's wildlife a disservice by refusing to consider what the act does well *and* does not do well. It is not enough to simply state that the ESA is on time and on target in the face of the overwhelming evidence to the contrary. We can do better. With better policies and implementation we can deliver better results for species and landowners alike.

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APPENDIX

KEY FACTS & STATISTICS:

Lack of Progress in Recovering Species

- There are 2388 listed species, 1690 of which are in the United States.
- 99% of listed species persist to this day, as many as 291 extinctions may have been avoided.
- However, only 3% of species have recovered.
- The Service predicted 300 species to recover by now but only 11 of those species have (4%).
- As of 2017, only 4% of listed species were even improving.

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[75] *See Field Guide, supra* n. 5. at 25.
[76] *See id*.
[77] Noah Greenwald, et al., *Extinction and the U.S. Endangered Species Act*, PeerJ (2019) (estimating that as many as 291 extinctions have been avoided due to the ESA, but relying on assumptions that make this more of an upper bound than reliable estimate). *See* Testimony of Jonathan Wood to the U.S. House Natural Resources Committee, Subcommittee on Water, Wildlife, and Fisheries, Hearing on the Endangered Species Act at 50, 2-3 (July 18, 2023).
[78] *See Field Guide, supra* n. 5 at 10-12.
[79] *See id*. at 13-17.
[80] *See id*. at 26-29.
[81] *See id*. at 30-33.
[82] *See id*. at 38-41.

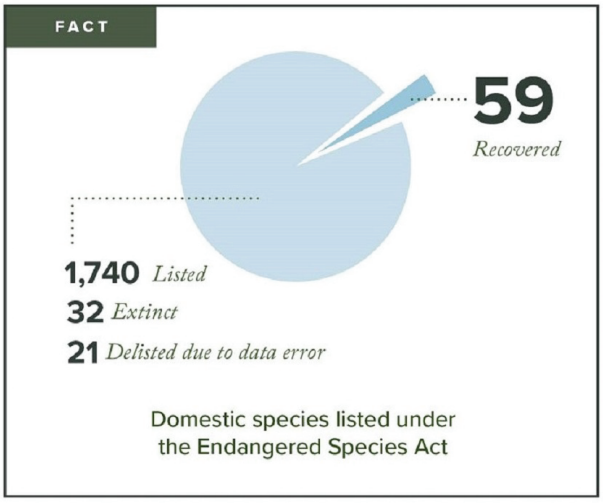
- 80% of listed species depend on proactive conservation effort to survive.
- 1/3 of species have no recovery plans.
- For species listed 30 or more years, only 10% of the actions identified in their recovery plan have been completed or partially completed.

A Blanket 4(d) Rule Would Undermine Recovery Incentives

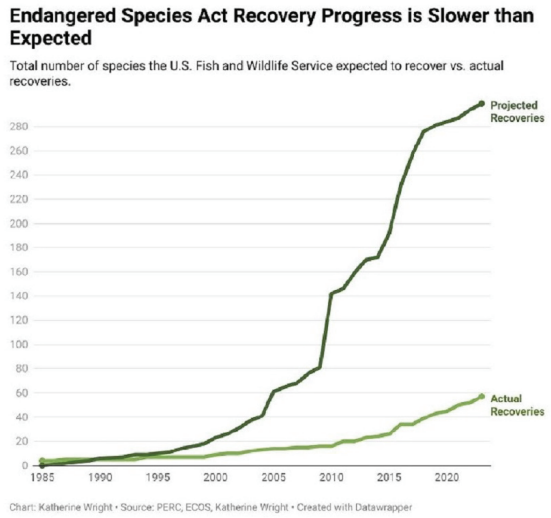
- While the prior blanket rule was in place, only 29 species improved from endangered to threatened. The percentage of endangered species upgraded to threatened is essentially the same as those that were downgraded from threatened to endangered. (2.2% v. 2.4%).
- The National Marine Fisheries Service, which has never had a blanket rule, has achieved a recovery rate of 6.7% compared to the Fish and Wildlife Service's 2.5%.
- When the blanket rule was in place, the Service reflexively stuck with its approach for 75% of species. Now that it is considering what approach is best for each species, that has plummeted to 0% for threatened animals.
- NMFS, which has never had a blanket rule, has found it appropriate to impose endangered-level regulation for threatened species only 3% of the time.

Incentives for Habitat Restoration

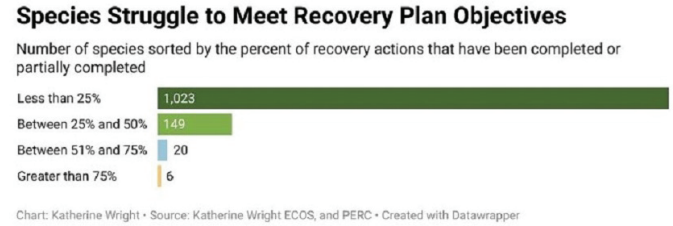
- Habitat loss is the leading threat to listed species.
- Private land provides habitat for 2/3rds of listed species.
- Private land provides 80%+ of the habitat for half of listed species.
- Critical habitat designations have lowered the value of designated land by as much as 78%.



Source: PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It* 4 (2023) (updated through Oct. 20, 2023).



Source: Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC (2023).



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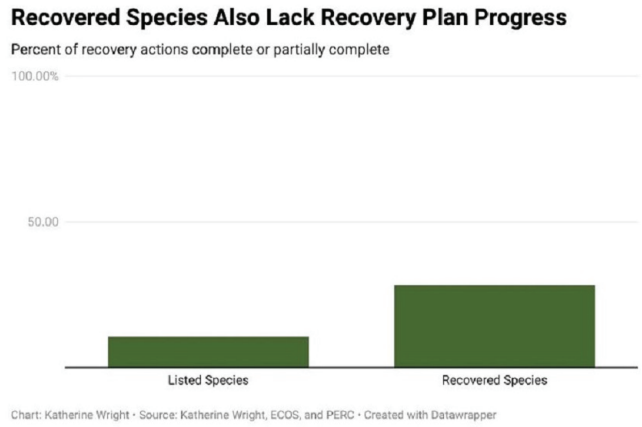
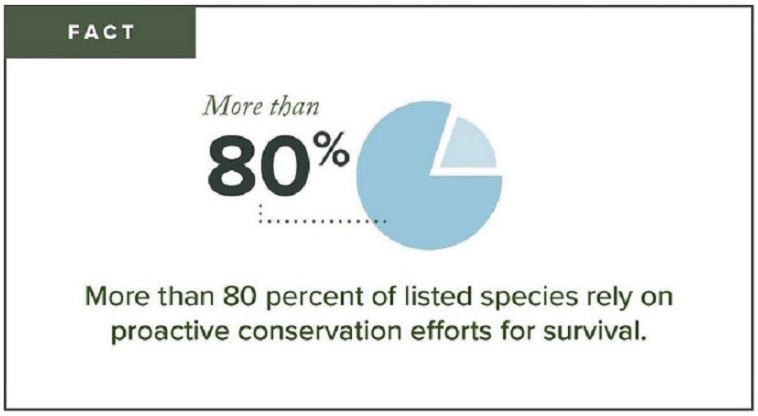
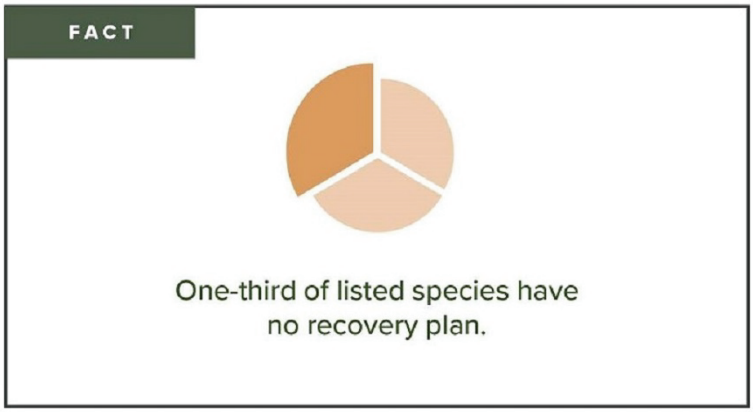


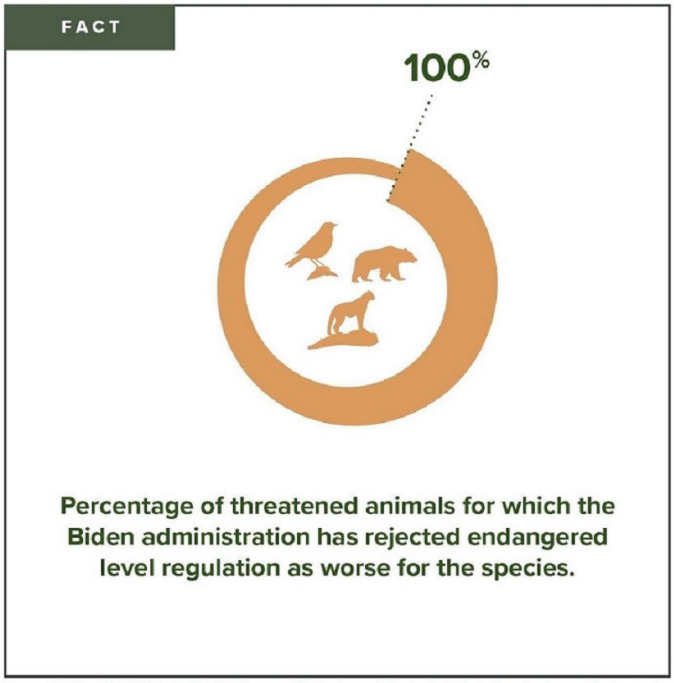
Source: Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC (2023).



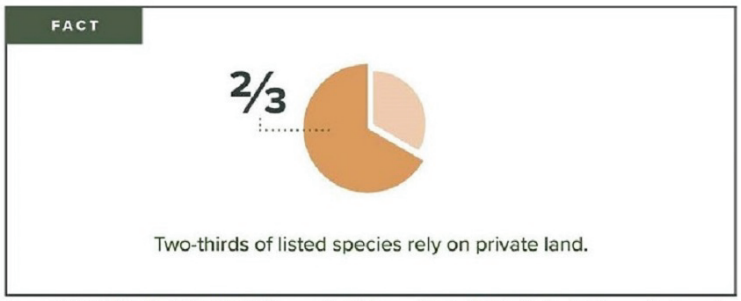
Source: PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It* 11 (2023).



Source: PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It* 12 (2023).

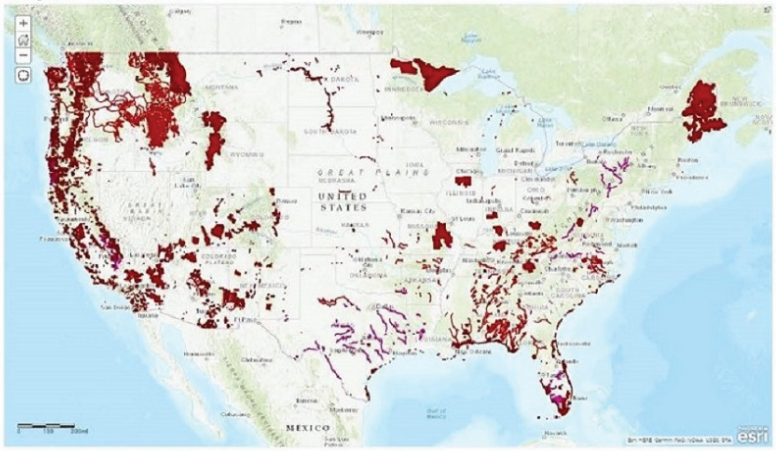


Source: PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It* 8 (2023).



Source: PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It* 24 (2023).

Designated Critical Habitat



Source: U.S. Fish and Wildlife Serv., *ECOS: Threatened & Endangered Species Active Critical Habitat Report* (last visited Oct. 20, 2023).

QUESTIONS SUBMITTED FOR THE RECORD TO JONATHAN WOOD, VICE PRESIDENT OF LAW AND POLICY, PROPERTY AND ENVIRONMENT RESEARCH CENTER (PERC)

Questions Submitted by Representative Newhouse

Question 1. Mr. Wood, you discuss in your testimony the issues surrounding critical habitat designations. Could you speak in a little more detail about how the service's proposal to expand the critical habitat definition is counterproductive to the intent of the ESA when it comes to such designations?

Question 2. Mr. Wood, you mentioned this in your testimony and I believe its very important to reiterate that tailored recommendations for species are proven to work better than blanket recommendations. Although we have touched on it, I believe it might be important for my other colleagues to hear again how destructive it could

be for this administration to bring back the blanket 4(d) rule, which was a rule that discarded in the Obama administration.

Answers.

Thank you again for the invitation to testify before the subcommittee in support of H.R. 5504. Thank you also for sharing the questions for the record from Congressman Newhouse on how the proposed blanket 4(d) rule and critical habitat regulations undermine the Endangered Species Act's goal of recovering species. My responses to these questions are below.

How Critical Habitat Designations Can Discourage Habitat Conservation and Restoration

One of the biggest causes of species decline and challenges to species recovery is loss of suitable habitat. For many species, recovery is simply not possible without significant, proactive efforts to maintain existing habitat and restore habitat where it has been lost or degraded. This is especially true for species threatened by climate change. However, critical habitat designations have "very little impact" from a "conservation perspective." [1] Worse, designations can discourage the maintenance and restoration of habitat features by dramatically lowering the value of lands containing these features.[2]

Consider, for instance, the recent critical habitat designation for the black pinesnake, which included 30,000 acres of private land in Clarke County, Alabama owned by the Skipper family.[3] There is scant evidence that the species is present on the Skippers land. Instead, the land appears to have been chosen for designation because it is within a state Wildlife Management Area (WMA). In Alabama, WMAs are voluntarily established by landowners to partner with the state on conservation projects and allow public recreation. By focusing on the WMA, the critical habitat designation penalized the Skipper family for their participation in this voluntary conservation program.

The decision is surprising because the Service concluded in its economic analysis that the designation would not lead to any on-the-ground benefit to the snake.[4] On the other hand, it acknowledged the designation would harm landowners, although it was unsure how much. It estimated that the Skippers and other landowners could lose up to $100 million in value, but stressed this is an upper bound rather than a precise estimate.[5] It is questionable, at least, whether the Service should impose a designation that could produce immense costs for no direct conservation benefit under a statute that requires the agency to weigh costs and benefits.

But the most concerning aspect is that the Service ignored how these costs may affect the incentives of landowners to conserve and restore habitat. Fearing additional punishments for their conservation activities, the Skippers promptly withdrew the land from the WMA program. "No good deed goes unpunished," Gray Skipper told my PERC colleague in an interview.[6] Ultimately, the effect of the designation of the Skipper's land has been less conservation, not more. But this problem is not limited to the Skippers. According to Scott Jones, CEO of the Forest Landowners Association, the designation "put a target on longleaf pine" that only "makes landowners want to remove longleaf pine habitat." [7]

Recovering species means working with conservation-minded landowners like the Skippers, not penalizing them. Yet, too often, critical habitat designations harm landowners who conserve habitat while providing no reward to landowners willing to maintain or restore it.

How the Blanket 4(d) Rule Undermines Incentives to Recover Species

Similarly, the proposal to restore the so-called blanket 4(d) rule is an idea that seems like it should help species but would actually thwart their recovery. And, again, the reason is incentives. When regulations become less stringent as species

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[1] David J. Hayes, Michael J. Bean, Martha Williams, *A Modest Role for A Bold Term: "Critical Habitat" Under the Endangered Species Act*, 43 Envtl. L. Rep. 10,671, 10,672 (2013).

[2] Maximillian Aufhammer et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 Land Econ. 188 (2020).

[3] *See* Tate Watkins, *Conservation and Punishment*, PERC Reports (2023).

[4] *See* Memo from Industrial Economics to the U.S. Fish & Wildlife Serv., re: *Screening Analysis of the Likely Economic Impacts of Critical Habitat Designation for the Black Pinesnake* 22 (Oct. 22, 2014).

[5] *See id.* at 20.

[6] *See* Watkins, *supra* n. 3..

[7] *See id.*

recover, states and landowners have an incentive to work toward that result.[8] When endangered and threatened species are regulated the same, states and landowners are made indifferent to a species status and whether it is improving or declining. The dismal percentage of species that have recovered[9]—or even improved[10]—during the decades that the blanket 4(d) rule was previously in place is powerful evidence that it doesn't work. This is part of the reason that one of the few policy agreements between the Obama administration and Trump administration was to move away from the blanket 4(d) rule in favor of rules tailored to the unique needs of each species.

A few examples demonstrate the problems with the blanket 4(d) rule. In the 1970s, Florida's manatee population was down to just a few hundred, leading to its listing as endangered. The species' popularity spurred the state, landowners, and conservationists to invest in proactive habitat conservation and restoration.[11] Save Crystal River, a local conservation nonprofit, has spent years restoring more than 800 natural warm-water springs gummed up by algae and sediment, planting sea grass, and removing phosphorus to improve water quality. These and other investments have paid off. The population has grown to nearly 8,000 and expanded into more of its historical range on the East and Gulf Coasts.

To reward its recovery efforts, Save Crystal River petitioned the Service to upgrade the manatee to threatened, which it did in 2017. While this seemed like a cause for celebration, the service quickly doused such hopes. Because the blanket 4(d) rule was in place at the time, there would be no change in regulation to reward those like Save Crystal River that had made the upgrade possible. One Service spokesman even dismissed as a "misperception" that endangered and threatened are distinct classifications.[12] Now that new threats to the manatee have arisen, states and landowners have nothing to lose if it is downgraded to endangered once again, since that status change will also result in no change in regulation of the species.

The biggest impact of the blanket 4(d) rule, however, is likely felt by the endangered species that never recover to the point that they can be upgraded to threatened, since states and landowners are not encouraged to work toward that result. Consider, for instance, the plight of the Pacific pocket mouse. Listed as endangered in 1994, the Service issued a recovery plan in 1998 establishing several criteria for upgrading the species to threatened, including increasing the number of populations from 3 to 10 as well as a fivefold increase in occupied habitat.[13] The Service predicted these goals could be met this year. Unfortunately, the species has made little progress in the last 25 years. According to a 2020 status review, there remained only three populations and the area of occupied habitat may have shrunk.[14] If landowners in the area were assured that their efforts to restore habitat and recover the species would be rewarded, rather than dismissed as in the manatee case, perhaps the mouse would actually be on the road to recovery, rather than remaining stuck for decades on the precipice of extinction.

Finally, it's worth noting that the Service did not dispute any of this in its proposal to restore the blanket 4(d) rule. It didn't, for instance, find that its earlier determination—that "private landowners and other stakeholders may see more of an incentive to work on recovery actions" without a blanket 4(d) rule[15]—was in error. Indeed, the proposal ignores incentives and the critical role private landowners (who are nowhere even mentioned in the proposal) play in conserving and recovering species. And the Service makes clear that, if the blanket rule is reinstated, it will no longer consider what's best for each species before applying it.

Mr. BENTZ. Thank you.

The Chair recognizes Dr. Alex Loureiro, Scientific Director at EnerGeo Alliance in Houston, Texas.

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[8] *See* Jonathan Wood, *Restore the Two-Step Process in A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It*, PERC (2023).

[9] Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC (2023).

[10] Department of the Interior, *2017/2018 Annual Performance Plan & 2016 Report* 15 (May 26, 2017).

[11] *See Restore the Two-Step Process*, *supra* n. 8.

[12] Patricia Sagastume, *Reclassifying Florida Manatees: From Endangered to Threatened*, Al Jazeera America (Aug. 8, 2014).

[13] U.S. Fish & Wildlife Serv., *Recovery Plan for the Pacific Pocket Mouse* (1998).

[14] U.S. Fish & Wildlife Serv., *5-Year Review: Pacific Pocket Mouse* (2020).

[15] 84 Fed. Reg. at 44,757.

Doctor, you are recognized for 5 minutes.

STATEMENT OF ALEX LOUREIRO, SCIENTIFIC DIRECTOR, ENERGEO ALLIANCE, HOUSTON, TEXAS

Dr. LOUREIRO. Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee. My name is Alex Loureiro, and I am the Scientific Director for the EnerGeo Alliance, the global trade association for geoscience companies, innovators, and energy developers who use Earth science to discover, develop, and deliver energy sustainability to the world.

I appreciate the opportunity to testify today regarding the scientific deficiencies contained within the National Marine Fisheries Service's proposal to designate Rice's whale critical habitat, and the Alliance's strong support for H.R. 6008.

To be clear, my objective today is not to argue that Rice's whales do not merit protection. Quite the opposite. Rather, my concern is that the proposed rule to designate critical habitat and the stipulated agreement and associated notice to lessees fail to rely on the best available science, are unlikely to provide additional protection to Rice's whales, and may contribute to unintended deleterious consequences.

The Rice's whale was designated as endangered based on risks to its habitat due to anthropogenic activity and climate change. It should be noted that, unlike the North Atlantic right whale, the Rice's whale population has not shown any indication of decline. The population is currently estimated at 51 individuals. NMFS has proposed to designate an area of 28,000 square miles as critical habitat, asserting that all are occupied. This equates to an area of about eight times the size of Washington, DC for each individual animal, assuming the animals are distributed uniformly, and we know they are not.

Rice's whale detections during industry operations are quite rare. Historical observations by protected species observers from 2010 to 2014 resulted in only 13 documented detections, and 9 were conclusively ruled not to be Rice's whales. This is about a 70 percent detection error rate.

A separate data set reported 15 unconfirmed detections in over 194,000 hours of observer effort. Even if we assume that all of these detections were in fact Rice's whales, this would require nearly a year and a half of 24/7 observer effort in order to encounter a single animal.

By comparison, the detection rate for all other protected species combined is about one sighting every 2 days. In 2022, a group at the NMFS Southeast Fisheries Science Center conducted a study to detect Rice's whale vocalizations using Passive Acoustic Monitoring, or PAM, along the shelf edge.

[Slide.]

Dr. LOUREIRO. You will note two sites on this map indicate no Rice's whale detections with open circles on the map. The hydrophone at site EP failed. The hydrophone at the Grand Isle site, indicated as GI, recorded zero calls in over 9,000 hours of data. The assumption that these animals are regularly moving between the eastern and western Gulf of Mexico along the shelf edge when not

a single call was detected in over a year of recording seems highly implausible.

This single flawed study is the linchpin of the BOEM notice to lessees and operators. Even if the results were clear, using a single study as the basis for sweeping changes across an entire industry is insufficient.

The biological opinion RPA describes protective measures to be applied in the DeSoto Canyon including speed restrictions, avoiding transit during low visibility, and maintaining separation from Rice's whales. These measures are appropriate, given the risk of ship strikes and the high concentration of animals in the DeSoto Canyon. Applying these measures outside of the DeSoto Canyon, as detailed in the NTL, would not only provide no tangible benefit to the species, but would lead to increased time in the water.

Given that the historical detection rate for other protected species is one sighting every 2 days, it is not difficult to see that application of these arbitrary measures across the entire shelf edge to protect Rice's whales, which are exceedingly rare outside of the DeSoto Canyon, would increase the likelihood of interacting with other protected species by keeping vessels at sea longer.

I will note that the highest detection rates outside of the DeSoto Canyon occurred at site WF, the western-most site, and those detection rates were 34 times lower than detection rates in the DeSoto Canyon.

Further still, increasing operational duration will increase environmental emissions, ultimately leading to even more broad-scale climate effects.

The proposed rule and, therefore, stipulated agreement and NTL are not based upon the best available science. In my opinion, compliance with the BiOp RPA ensures strong protection for the Rice's whale in the area where it is known to be most densely concentrated. Settling for an unscientific, overly broad critical habitat designation ultimately limits our ability to provide appropriate protection to individuals and the population.

The EnerGeo Alliance strongly supports H.R. 6008.

Thank you for the opportunity to testify today, and I look forward to your questions. I yield the remainder of my time.

[The prepared statement of Dr. Loureiro follows:]

PREPARED STATEMENT OF ALEXANDRIA E. LOUREIRO, PHD, SCIENTIFIC DIRECTOR, ENERGEO ALLIANCE

ON H.R. 6008

Chairman Bentz, Ranking Member Huffman, and Members of the Subcommittee:

For the record, my name is Alex Loureiro and I am the Scientific Director for the EnerGeo Alliance. I hold an MS and PhD in marine biology from Texas A&M University at Galveston, and a BS in marine science and biology from the University of Miami. My prior research experience focuses on marine mammal behavior both in the laboratory and in field, and large-scale fisheries in the U.S. Gulf of Mexico. At EnerGeo, I work closely with our members, regulators, and other stakeholders around the world to ensure that energy resources are identified and developed in an environmentally sustainable manner. I head the Gulf of Mexico Proactive Regulatory and Observational Program, an EnerGeo program that supports industry Marine Mammal Protection Act compliance under the existing Gulf of Mexico Incidental Take Regulation, and collects key marine mammal protection data. I have led the development of numerous industry guidance documents, including best practices for environmental impact assessments for seismic surveys

and guidance for geophysical survey crews to safely assist entangled wildlife encountered during operations. I am actively engaged in supporting research pertaining to the potential effects of industry operations, and provide input into ongoing member and government initiatives worldwide. Further, I participated as an expert in the 2021 workshops to inform recovery planning for the Rice's whale.

I present this testimony on behalf of the EnerGeo Alliance. Founded in 1971 as the International Association of Geophysical Contractors (IAGC), the EnerGeo Alliance is a global trade association for the energy geoscience industry, the intersection where earth science and energy meet. Providing solutions to revolutionize the energy evolution, the EnerGeo Alliance and its member companies span more than 50 countries, representing onshore and offshore survey operators and acquisition companies, energy data and processing providers, energy companies, equipment and software manufacturers, industry suppliers, service providers, and consultancies. Together, our member companies are the gateway to the safe discovery, development, and delivery of mainstay sources of energy, alternative energy, and low-carbon energy solutions that meet our growing world's needs.

Through reliable science- and data-based regulatory advocacy, credible resources and expertise, and future-focused leadership, the EnerGeo Alliance continuously works to develop and promote informed government policies that advance responsible energy exploration, production, and operations. As the global energy demand evolves, we believe that all policymakers and energy companies, providing mainstay, alternative, and low-carbon solutions,—should have access to reliable data and analysis to support their forward moving efforts.

I appreciate the opportunity to testify before the Subcommittee on Water, Wildlife and Fisheries regarding the scientific deficiencies contained within the National Marine Fisheries Service's (NMFS) proposal to designate Rice's whale (*Balaenoptera ricei*) critical habitat in the Gulf of Mexico (GOMx) ("Proposed Rule"),[1] and the bill to prohibit implementation of the Stipulated Agreement to Stay Proceedings and the associated Notice to Lessees until such time as the Assistant Administrator issues a final rule for Rice's whale critical habitat, finalizes the revision of the rule titled, "Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys in the Gulf of Mexico"[2] to correct take estimation errors, and enters into an agreement to conduct a study on the occurrence and range of Rice's whales throughout the GOMx.

The Proposed Rule was released for pre-publication in the Federal Register at 8:45am on July 21, 2023, just hours before the announcement that the environmental non-governmental organizations and the U.S. federal government reached a private settlement agreement in *Sierra Club et al. v. NMFS et al.*, Case No. 8:20-cv-03060-PX, to settle litigation via the Stipulated Agreement to Stay Proceedings (Stipulated Agreement) challenging an Endangered Species Act Biological Opinion (BiOp) addressing all oil and gas activities in the GOMx. In that settlement, the Bureau of Ocean Energy Management (BOEM)—not even a party to the lawsuit—purported to agree to exclude the same area proposed for critical habitat designation from future oil and gas lease sales. It is difficult to not find this timing suspicious.

It is important to understand the history of Rice's whale scientific literature in the GOMx in order to properly evaluate the Proposed Rule. The Rice's whale was first designated a new species in 2021.[3] Previously, these animals were considered a GOMx subspecies of Bryde's whales. The Rice's whale is considered endangered based on risks to its current habitat, related to anthropogenic activity and climate change.[4] There is no evidence to indicate that the population is declining, nor that animals are vulnerable to an acute anthropogenic threat.

NMFS has proposed to designated over 28,000 square miles of the GOMx continental shelf and slope as critical habitat, and asserts all are "occupied" by Rice's

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[1] *Endangered and Threatened Species; Designation of Critical Habitat for the Rice's Whale*, 88 Fed. Reg. 47,453 (July 24, 2023) (proposing to add 50 C.F.R. § 226.230 designating critical habitat for Rice's whale). NMFS extended the period to submit comments on the Proposed Rule to October 6, 2023. *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Rice's Whale, Public Hearing and Extension of Public Comment Period*, 88 Fed. Reg. 62,522 (Sept. 12, 2023).

[2] 88 Fed. Reg. 916.

[3] Rosel, P.E., L.A. Wilcox, T. K. Yamada, and K. D. Mullin. (2021). A new species of baleen whale (Balenoptera) from the Gulf of Mexico, with a review of its geographic distribution. Marine Mammal Science 37:577-610.

[4] *Endangered and Threatened Wildlife and Plants: Notice of 12-Month Finding on a Petition To List the Gulf of Mexico Bryde's Whale as Endangered Under the Endangered Species Act (ESA)*, 80 Fed. Reg. 18343 (December 8, 2016).

whales.[5] The most recent Stock Assessment Report (SAR) published by NMFS places the Rice's whale population in the GOMx at 51 individuals.[6] This equates to an area of about 550 square miles—about eight times the size of Washington, D.C.—for each *individual animal*, assuming the animals are uniformly distributed. However, historical detections, both visual and acoustic, are largely concentrated to the De Soto Canyon area in the northeastern GOMx, leaving an even broader swath of the designated habitat likely devoid of animals.

Indeed, Rice's whale detections are quite rare. In producing the new species designation, Rosel et al. (2021) described the Rice's whale detections in the GOMx between 1989–2019.[7] As part of this assessment, experts reviewed detection records from Protected Species Observers (PSOs) aboard seismic survey vessels in the western GOM between 2010–2014. Thirteen detections were recorded that may have been Rice's (then Bryde's) whales. Of these 13 sightings, nine were conclusively ruled out, and four could not be confirmed or definitively disproven. Two of these four had photographs indicating a baleen whale, but it was unclear whether the animal was a Rice's whale or sei whale.

Between 2002–2008, 15 unconfirmed Rice's whale detections were reported by PSOs aboard seismic vessels in the western GOM.[8] In total, 194,273 total hours of observer effort were necessary to produce these 15 unconfirmed detections. Even if all 15 were indeed Rice's whales (an assumption which seems improbable given the about 70% misidentification rate in the 2010–2014 analysis), this would still mean a Rice's whale was detected only once every 12,951 hours. That is, it would take *nearly a year and a half of 24-hour observer effort days to encounter a single animal* in areas where seismic operations occurred during this time—without even accounting for the likelihood that many, perhaps most, of these detections are not Rice's whales. If the 70% error rate from the prior dataset is applied, that figure approaches *five years* of round-the-clock effort for a single detection by PSOs. While it is possible that animals may avoid active seismic survey operations, it should be noted that the detection rate for all other protected species combined from this dataset was 20.15 sightings per 1,000 hours of observation—that is, one encounter about every 50 hours. Comparatively, Rice's whale detections in the western GOMx are vanishingly rare.

In 2015, a density model was developed based on 25 Rice's whale (then GOMx Bryde's whale) detections. Of these 25, 17 were definitively Rice's whales and located in the De Soto Canyon; the remaining eight outside of the De Soto area were inconclusive and may or may not have been Rice's whales. All but two of these detections occurred within the De Soto Canyon.[9] With little additional information and a need for a density model for the purposes of NMFS's calculating marine mammal takes under the MMPA, the authors examined all 25 detections (even though only 17 were confirmed). The two western GOMx detections were ultimately excluded by the authors, given that at the time of drafting no Rice's whales had been detected in the western GOMx in over 20 years. From the 23 detections used, the authors developed a GOMx-wide model for Rice's whale distribution based only on two factors: geographic coordinates of the detections and water depth. The resultant model indicates a high concentration of Rice's whales in the eastern GOM, with very low densities along the central GOM shelf edge (see Figure 1).[10] It should be noted as well that the breaks in the scale of the density map are *logarithmic*. From this map, it is clear that the model suggests a high concentration of Rice's whales in the De Soto area, fewer along the shelf edge towards the Mississippi, and a precipitous drop along the shelf edge westward. (The "<0.0010" throughout the GOMx indicates that the animals are not physically constrained to the shelf edge, but are extremely unlikely to venture into shallower or deeper waters.)

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[5] 88 Fed. Reg. at 47,455; *id*. at 47,460.

[6] Hayes, S.A., *et al*. 2023. U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2022. NOAA Tech. Mem. NMFS-NE-304.

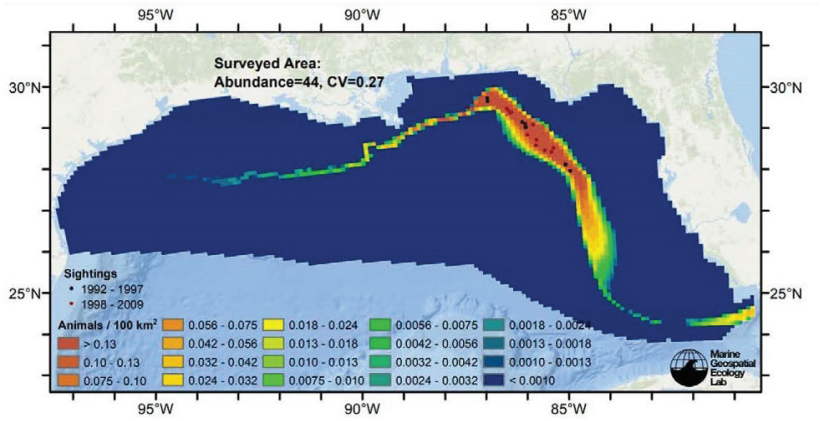
[7] Rosel, P. E., L. A. Wilcox, T. K. Yamada, and K. D. Mullin. (2021). A new species of baleen whale (*Balenoptera*) from the Gulf of Mexico, with a review of its geographic distribution. Marine Mammal Science 37:577-610.

[8] Barkaszi, M. J., M. Butler, R. Compton, A. Unietis, and B. Bennet. (2012). Seismic survey mitigation measures and marine mammal observer reports. OCS Study BOEM 2015-015. U.S. Department of the Interior, Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, New Orleans, LA.

[9] Roberts, J.J., B.D. Best, L. Mannocci, E. Fujioka, P.N. Halpin, D.L. Palka, L.P. Garrison, K.D. Mullin, T.V.N. Cole, C.B. Khan, W.M. McLennan, D.A. Pabst, and G.G. Lockhart. (2015). Density Model for Bryde's Whale (*Balaenoptera edeni*) for the U.S. Gulf of Mexico Version 3.1, 2015-11-06, and Supplementary Report. Marine Geospatial Ecology Lab, Duke University, Durham, North Carolina.

[10] Roberts *et al*. (2015).

Figure 1



This model also does not account for the unique oceanographic features present in the De Soto Canyon area that may make this region the species' preferred habitat. This area serves as an important upwelling site due to the physical habitat characteristics, making nutrients available to organisms.[11] This nutrient availability increases biotic productivity. Due to its physical structure and location relative to important water masses in the GOM, this geologic feature creates a unique environment in its immediate area.[12] These features do not exist in tandem across the entire continental shelf edge, and are likely one of the drivers for the concentration of Rice's whales in the De Soto area.

The lynchpin of BOEM Notice to Lessees and Operators (NTL) No. 2023-G01 is, "one recent study," from Soldevilla et al. (2022).[13] (Unto itself, this is problematic; use of a single study to construct a paradigm on which to recommend sweeping changes across an essential industry is unscientific at best.) Further, the study in question draws a conclusion which merits reexamination: that the animals detected via passive acoustic monitoring (PAM) are part of the same population as the Rice's whales detected in the eastern GOM De Soto area. The authors note that, "The stereotyped long-moan calls are detected in such high numbers within the core habitat . . . that a manual review and logging is not feasible." Clearly, the De Soto Canyon (DC) site represents a concentrated population of Rice's whales present year-round. They note specifically that, ". . . more than 66,000 eastern GOM long-moan calls were detected at the DC site." Comparatively, 1,939 total calls were recorded at the Flower Garden West (WF) site; 429 at the Flower Garden East (EF) site; and three at the Eugene Isle South (EI) site (see Figure 2). *Zero* calls were recorded at the Grand Isle South (GI) site, which is geographically closest to the De Soto Canyon (Figure 2). (Note that the hydrophone at the East Main Pass (EP) site failed early in the study and was excluded from the analysis.) Assuming that Rice's whales follow the depth contour of 100-400 m, the animals would need to pass the GI site *en route* to the western GOM locations. The implication that these animals move from the eastern to western GOM along this shelf edge when not a *single* call was detected in 9,072 hours of recordings over the course of almost 13 months at this intermediate site seems rather implausible. The authors themselves state that, "Considering the lack of detections at site GI . . . it remains unknown

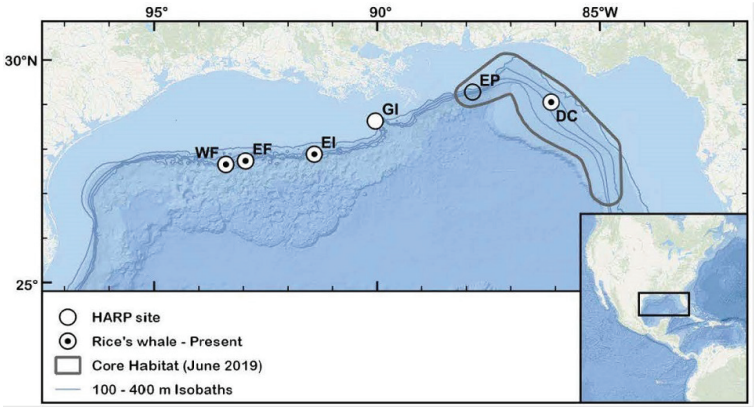
[11] Kendall, J.J., and W.W. Schroeder. (2000). I. Physical/Biological Oceanographic Integration Workshop for the De Soto Canyon and Adjacent Shelf: How, and Why, We Got Here. In: Physical/Biological Oceanographic Integration Workshop for the DeSoto Canyon and Adjacent Shelf: October 19-21, 1999. W.W. Schroeder and C.F. Wood, eds. OCS Study MMS 2000-074. U.S. Department of the Interior, Minerals Management Service, Gulf of Mexico OCS Region, New Orleans, LA. 168 pp. OCS Study MMS 2000-074. U.S. Department of the Interior, Minerals Management Service, Gulf of Mexico OCS Region, New Orleans, LA. 168 pp.

[12] Bortone, S.A., and W. Johnson. (2000). III. Working group Summaries, Working Group I. In: Physical/Biological Oceanographic Integration Workshop for the DeSoto Canyon and Adjacent Shelf: October 19-21, 1999.

[13] Soldevilla, M.S., A.J. Debich, L.P. Garrison, J.A. Hildebrand, and S.M. Wiggins. (2022). Rice's whales in the northwestern Gulf of Mexico: call variation and occurrence beyond the known core habitat. Endangered Species Research 48:155-174.

whether animals are moving between the northwestern and northeastern sites or whether these represent different groups of animals." [14]

Figure 2



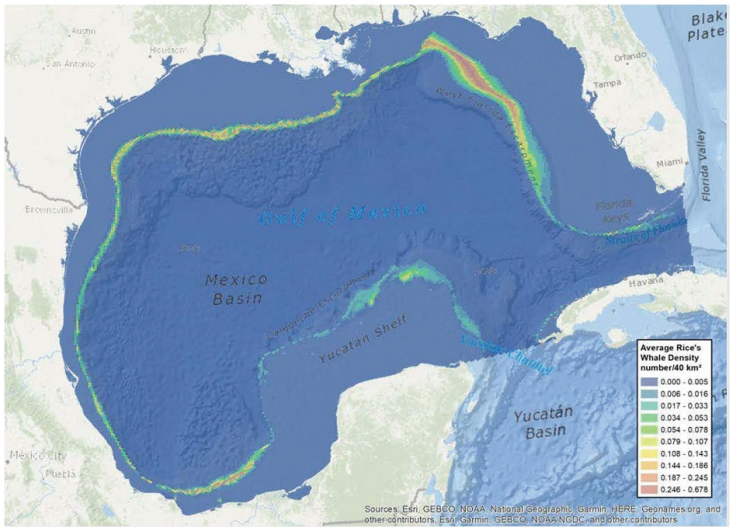
The latest density models produced have not yet undergone peer review in the scientific literature and have only recently been published in NMFS and BOEM reports.[15,16] These density models incorporate seafloor water temperature and intermediate Chlorophyll-*a* concentration (a proxy for primary productivity) commonly associated with Rice's whale detections. However, these detections have almost exclusively occurred within the De Soto Canyon. The authors proceed to extrapolate *far* beyond the data frame—a practice widely frowned upon by the scientific and modelling communities—to produce a density map for the *entire* GOMx (see Figure 3). The assumption that primary production, temperature at the seafloor, and water depth drive Bryde's whale distribution, rather than simply correlating with the few documented detections in a small portion of the GOMx, is highly suspect. Moreover, these reports only became available in June 2023, providing very little time for interested parties to review the information prior to publication of the Proposed Rule.

[14] Soldevilla *et al*. (2022).

[15] Garrison, L.P, Ortega-Ortiz, J., Rappucci. G, Aichinger-Dias, L, Mullin, K., Litz, J. (NOAA Southeast Fisheries Science Center, Miami, FL). 2023. Gulf of Mexico Marine Assessment Program for Protected Species (GOMMAPPS): marine mammals. Volume 2: appendix C: Gulf of Mexico marine mammal spatial density models. New Orleans (LA): US Department of the Interior, Bureau of Ocean Energy Management. 1264 p. Obligation No.: M17PG00013. Report No.: OCS Study BOEM 2023-042.

[16] Rappucci, G., Garrison, L.P., Soldevilla, M., Ortega-Ortiz, J., Reid, J., Aichinger-Dias, L., Mullin, K., and Litz, J. 2023. Gulf of Mexico Marine Assessment Program for Protected Species (GoMMAPPS): marine mammals. Volume 1: report. New Orleans (LA): US Department of the Interior, Bureau of Ocean Energy Management. 104 p. Obligation No.: M17PG00013. Report No.: OCS Study BOEM 2023-042.

Figure 3



From this information, it is clear that NMFS's determination that the entire GOMx is "occupied" is not supported by the best available science or the record before the agency. Just a few years prior, in its 2019 listing determination, NMFS noted that Rice's whales are, "restricted primarily to a small region along the continental shelf break in the De Soto Canyon area."[17] Just weeks after releasing the Proposed Rule, NMFS *again* reiterated in its stock assessment report that, "Sighting records and acoustic detections of Rice's whales in the northern Gulf of Mexico (i.e., U.S. Gulf of Mexico) occur primarily in the northeastern Gulf in the De Soto Canyon area, along the continental shelf break between 100 m and 400 m depth."[18] NMFS cannot rationally determine that the entire GOMx is occupied, while also explicitly stating that the De Soto Canyon hosts the majority of the species and that the species has not been documented outside of a narrow depth range.

The Reasonable and Prudent Alternative (RPA) of the BiOp provides measures to minimize and mitigate potential risks to Rice's (then Bryde's) whales. These measures include visual monitoring when transiting the Rice's whale area, reporting transit plans to BOEM or BSEE, observing a speed restriction to 10 knots during daylight hours, avoiding nighttime or low visibility transit, and maintaining a separation distance of 500 m from Rice's whales. The Rice's whale area proposed in the BiOp is focused around the De Soto Canyon, with a buffer included (see Figure 4). Nearly all documented Rice's whale visual detections have occurred in this area, and therefore, mitigation measures intended to reduce the risk of ship strikes in this region are appropriate. Applying similar measures outside of the Rice's whale area put forward in the BiOP RPA would be unlikely to provide additional benefit or protection to the animals given the infrequency with which they are observed in the central and western GOMx.

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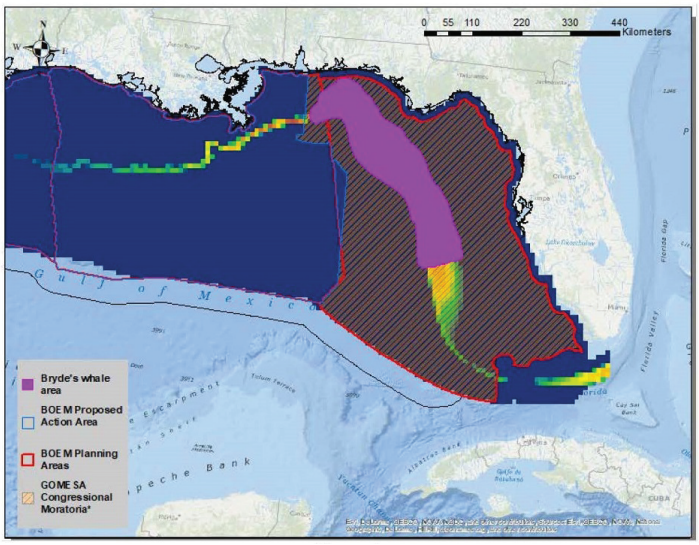
[17] *Endangered and Threatened Wildlife and Plants; Endangered Status of the Gulf of Mexico Bryde's Whale*, 84 Fed. Reg. 15,446, 15,460 (Apr. 15, 2019). NMFS revised the common name of the species from Bryde's whale to Rice's whale in 2021. *Endangered and Threatened Wildlife and Plants; Technical Corrections for the Bryde's Whale (Gulf of Mexico Subspecies)*, 86 Fed. Reg. 47,022 (Aug. 23, 2021).

[18] Stock Assessment Report at 114; *see Final 2022 Marine Mammal Stock Assessment Reports*, 88 Fed. Reg. 54,592 (Aug. 11, 2023) (announcing release of Stock Assessment Report).

Figure 4



Applying these measures outside of the BiOp RPA as detailed in the NTL would not only provide no tangible benefit to the species, but would significantly disrupt industry operations in the GOMx to the point of inflicting unintended negative consequences on other protected species. The ultimate goal of mitigation measures is to prevent the need for their use in the first place by decreasing the likelihood of interaction. Applying mitigation measures that are not risk-based delays operations, leading to increased time on the water. Given that the historical detection rate for other protected species is a sighting about every 50 hours, it is not difficult to see that application of these arbitrary measures across the entire shelf edge to protect Rice's whales—which are exceedingly rare in the western and central GOMx—would increase the likelihood of interacting with another protected species. Further still, increasing operational duration will increase environmental emissions, ultimately leading to even more broad-scale effects.

The EnerGeo Alliance appreciates and supports inclusion of requirements, in the bill, that NOAA Fisheries ensure that parties directly impacted by the Stipulated Agreement or Notice to Lessees shall be engaged in the reinitiated consultation on the Biological Opinion—particularly including the opportunity to review drafts and provide comment which shall be afforded due consideration. Robust consultation with the energy geoscience industry on development of a revised Biological Opinion and resultant RPAs, as required by the bill, will contribute to more accurate and scientifically valid agency actions on the Rice's Whale in the GOMx.

Finally, the EnerGeo Alliance strongly supports the provision requiring that the Assistant Administrator enter into an agreement with the National Academies of Science, Engineering, and Medicine to conduct a study to determine the occurrence of Rice's whales in the GOMx. The EnerGeo Alliance is eager to continue to improve the state of our knowledge of Rice's whales and is actively engaged in planning future research to accomplish this objective because conservation of marine resources is a top priority for the organization.

The Proposed Rule, and therefore Stipulated Agreement and NTL, are not based upon the best available science, and therefore the EnerGeo Alliance supports prohibition of implementation until such time as the agency undertakes additional work to update these conclusions. In my opinion, compliance with the BiOp RPA ensures strong protection for the Rice's whale to ensure the continued survival and fecundity of the species. Expanding the Rice's whale area across the 100-400 m isobath throughout the central and western GOMx is unlikely to provide additional protection, but certain to drive unintended consequences that may contribute to deleterious effects on other species and global emissions reduction goals. In my professional opinion, settling for an unscientific, overly broad critical habitat des-

ignation ultimately fails the species, and limits our ability to provide appropriate protection to individuals and the population.

Included here by reference, and attached for the record, are the comments submitted by the EnerGeo Alliance and the American Petroleum Institute (API) along with other U.S. focused energy trade associations. The comment letter was submitted October 6, 2023, entitled, "Comments of Trade Associations regarding the proposed rule to designate Rice's whale critical habitat—NOAA-NMFS-2023-0028". The submission includes two 3rd party reports: "Review of the Rice's Whale Proposed Critical Habitat and Related Scientific Literature", and "The Economic Impacts of Gulf of Mexico Oil and Natural Gas Vessel Transit Restrictions".

I appreciate the opportunity to testify today.

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The following documents were submitted as supplements to Mr. Loureiro's testimony.

American Petroleum Institute • EnerGeo Alliance
National Ocean Industries Association
Independent Petroleum Association of America

October 6, 2023

VIA Federal eRulemaking Portal: http://www.regulations.gov

Mr. David Bernhart
Assistant Regional Administrator, Protected Resources Division
National Marine Fisheries Service, Southeast Regional Office
263 13th Avenue South
St. Petersburg, FL 33701

Re: Comments of Trade Associations regarding the proposed rule to designate Rice's whale critical habitat—NOAA-NMFS-2023-0028

Dear Mr. Bernhart:

This letter provides the comments of the American Petroleum Institute ("API"), EnerGeo Alliance ("EnerGeo"), National Ocean Industries Association ("NOIA"), and Independent Petroleum Association of America ("IPAA") (collectively, the "Associations") in response to the National Marine Fisheries Service's ("NMFS") proposal to designate Rice's whale (*Balaenoptera ricei*) critical habitat in the Gulf of Mexico ("GOMx") ("Proposed Rule").[1] The Associations appreciate NMFS's consideration of these comments, which include the attached *Review of the Rice's Whale Proposed Critical Habitat and Related Scientific Literature* prepared by LGL Ecological Research Associates (hereinafter referred to as "Ireland (2023)") (Attachment A) and *The Economic Impacts of Gulf of Mexico Oil and Natural Gas Vessel Transit Restrictions* prepared by Energy & Industrial Advisory Partners (hereinafter referred to as "EIAP (2023)") (Attachment B). The Associations request that this comment letter and all attachments be included in the administrative record for this rulemaking.

I. THE ASSOCIATIONS

API is a national trade association representing nearly 600 member companies involved in all aspects of the oil and natural gas industry, including those that operate within the GOMx in areas that NMFS is proposing to designate as Rice's whale critical habitat. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting

[1] *Endangered and Threatened Species; Designation of Critical Habitat for the Rice's Whale*, 88 Fed. Reg. 47,453 (July 24, 2023) (proposing to add 50 C.F.R. § 226.230 designating critical habitat for Rice's whale). NMFS extended the period to submit comments on the Proposed Rule to October 6, 2023. *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Rice's Whale, Public Hearing and Extension of Public Comment Period*, 88 Fed. Reg. 62,522 (Sept. 12, 2023).

environmental requirements, while economically developing and supplying energy resources for consumers.

EnerGeo is the international trade association representing the industry that provides geophysical services (geophysical data acquisition, processing and interpretation, geophysical information ownership and licensing, and associated services and product providers) to the oil and natural gas industry. EnerGeo member companies, which operate within the GOMx in areas that NMFS is proposing to designate as Rice's whale critical habitat, play an integral role in the successful exploration and development of offshore hydrocarbon resources through the acquisition and processing of geophysical data.

The National Ocean Industries Association represents the interests of all segments of the offshore energy industry, including offshore oil and gas, offshore wind, offshore minerals, offshore carbon capture, use and sequestration, and other emerging technologies. NOIA's membership includes energy project leaseholders and developers and the entire supply chain of companies that make up an innovative ecosystem contributing to the safe and responsible development and production of offshore energy.

The Independent Petroleum Association of America is a national upstream trade association representing thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 91 percent of the nation's oil and natural gas wells. These companies account for 83 percent of America's oil production, 90 percent of its natural gas and natural gas liquids production, and support over 4.5 million American jobs.

II. SUMMARY OF COMMENTS

NMFS proposes to designate over 28,000 square miles of GOMx continental shelf and slope that it asserts are all "occupied" by Rice's whales.[2] This proposal (if adopted) is arbitrary, capricious, and violates the Administrative Procedure Act ("APA") and the Endangered Species Act ("ESA") as follows:

- NMFS's determination that the entire GOMx is "occupied" is not supported by the best available science or the record before the agency, and is contradicted by NMFS's own statements that the Rice's whale's range is primarily restricted to the De Soto Canyon area of the northeastern GOMx and that Rice's whales rely on that area for all of their life history stages. NMFS cites only a single Rice's whale sighting off the central Texas coast and potential acoustic detections in the western and northern GOMx as support for its conclusion that Rice's whales "occupy" the entire GOMx (while simultaneously dismissing equally rare Atlantic continental shelf sightings). This is both legally and scientifically insufficient to demonstrate that Rice's whales actually use the entire GOMx with sufficient regularity to qualify as occupied habitat.
- Because NMFS has not demonstrated that Rice's whales occupy the entire GOMx, it fails to meet the ESA's requirement to designate as critical habitat the "specific areas within" the broader geographical area occupied by the species.
- Even within the areas proposed for designation, NMFS has failed to demonstrate that all areas are occupied by Rice's whales—or even qualify as "habitat." Conclusions regarding the presence of Rice's whales in much of the central and northwestern GOMx continental shelf appear to be based on predictive modeling, not on sightings or other evidence. There is no regular pattern in the acoustic data suggesting a persistent Rice's whale presence in these areas. Moreover, there are no data regarding mating, births, prey availability, or other information that would demonstrate that these areas actually support the life history parameters of Rice's whales. For these reasons, NMFS has failed to demonstrate that the central and northwestern GOMx continental shelf and slope are "occupied" or even "habitat."
- NMFS is required to identify specific locations within the proposed critical habitat designation where essential habitat features "are found." Instead, NMFS identifies a single oceanographic feature—the 100- to 400-meter isobath—as "essential" to Rice's whales but acknowledges that the "attributes" making this area valuable to Rice's whales are prey availability, certain water characteristics, and quiet conditions. NMFS does not identify where, within the proposed critical habitat designation, these key attributes

[2] 88 Fed. Reg. at 47,455; *id*. at 47,460.

are found, in violation of the ESA's requirement to identify the "specific areas" where such essential features exist.

- NMFS's identification of "sufficiently quiet conditions" as a valuable "attribute" of Rice's whale habitat is arbitrary and capricious because in-water sound is not an element of habitat but rather the result of natural and anthropogenic sources introducing sound to the marine environment. "Sufficiently quiet conditions" is not a "feature" that can be "found" in a "specific area" as required by the ESA. Furthermore, NMFS admits that much of the area proposed for designation is subject to anthropogenic sound, which means that NMFS does not know if "quiet conditions" are even present in areas proposed as critical habitat.
- Finally, NMFS's economic analysis fails to identify and consider known and likely costs of a critical habitat designation, falling materially short of the ESA's requirements by dismissing the potential for substantive modifications to federally permitted activities. Most critically, although NMFS acknowledges that energy development activities may be subject to conservation measures or other "special management" protections, it irrationally concludes that a designation would not result in project modifications. Indeed, burdensome protection measures and development restrictions that appear to derive from NMFS's proposed critical habitat designation have already been included in GOMx lease stipulations and acreage exclusions in the very area proposed for designation.[3] These measures and all the other future measures, the effects of which were ignored by NMFS, will have enormous economic impacts. NMFS's failure to identify or consider these impacts violates the ESA.

For these reasons, as described in the Associations' detailed comments below, NMFS must withdraw the Proposed Rule and reissue a critical habitat proposal that identifies for designation only those "specific areas within" areas of the GOMx actually occupied by Rice's whales that qualify as habitat and on which are "found" the "essential features" of Rice's whale habitat that require special management. NMFS must consider the material economic, national security, and other relevant impacts of such a designation, including from "adverse modification" findings, as well as the revenue implications for the federal and state governments. Should NMFS move forward with designation of Rice's whale critical habitat, it should exclude from such designation the central and northwestern GOMx where the impact of a designation would far outweigh any potential benefits to Rice's whales.

III. DETAILED COMMENTS

A. NMFS's determination that the entire GOMx is "occupied" is not supported by the best available science or the record before the agency, and is contradicted by NMFS's own statements.

The ESA provides for designation of critical habitat to the extent "prudent and determinable"[4] in "specific areas within the geographical area *occupied by the species*" at the time of listing.[5] Unoccupied habitat can also be designated as "critical" but only after a determination that occupied habitat is inadequate for the species' conservation[6]—a conclusion that NMFS does not make in the Proposed Rule.[7] Therefore, before determining which "specific areas within" Rice's whale's occupied habitat should be designated as critical, NMFS must define its occupied habitat. In the Proposed Rule, NMFS finds that "at the time of listing Rice's whales

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[3] A federal court has preliminarily enjoined these stipulations and acreage exclusions. *Louisiana v. Haaland*, No. 23-30666 (5th Cir. Sept. 25, 2023) (slip op.), *aff'g*, Nos. 2:23-CV-01157 & 2:23-CV-01167 (W.D. La. Sept. 21, 2023) (Memorandum Order).

[4] 16 U.S.C. § 1533(a)(3)(A).

[5] *Id*. § 1532(5)(A)(i) (emphasis added).

[6] *Id*. § 1532(5)(A)(ii) (unoccupied habitat may be designated if the area is "essential for the conservation of the species"); 50 C.F.R. § 424.12(b)(2) ("The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species.").

[7] *See Endangered Species Act Rice's Whale Critical Habitat Report, Proposed Information Basis and Impact Considerations of Critical Habitat Designation*, at 29 (July 2023), https://www.fisheries.noaa.gov/s3/2023-07/Critical-Habitat-Report-508-Final.pdf (stating that NMFS is not able to identify any areas outside of the geographical area occupied by the species that are essential for its conservation) ("Critical Habitat Report").

occupied the Gulf of Mexico."[8] This finding is not supported by the best available science or the record before the agency, and is arbitrary and capricious.

In support of its conclusion that Rice's whales occupy the entire GOMx,[9] NMFS cites only (1) a single 2017 confirmed sighting in the western GOMx off the central Texas coast and (2) potential acoustic detection of Rice's whale calls in the western and northern GOMx from July 2016 to August 2017.[10] Based on these limited data—and despite rejecting similarly limited data on the Atlantic coast in determining occupancy[11]—NMFS explains that Soldevilla et al. (2022b) concluded that Rice's whales "persistently occur over a broader distribution in the GOMx than was previously understood."[12] From this alone, NMFS takes an arbitrary and unscientific leap to conclude that the Rice's whales "occupied the Gulf of Mexico" at the time of listing.[13]

The ESA's implementing regulations define the "geographical area occupied by the species" to include areas that are used "periodically," but they must in fact be "used" (and "not solely by vagrant individuals").[14] Courts have found that an area is occupied only if a species uses the area "with sufficient regularity that it is likely to be present during any reasonable span of time."[15] Sightings of one or two individuals of a species are not sufficient to determine that an area is "occupied."[16] The limited sighting and acoustic data identified in the Proposed Rule are therefore insufficient to support NMFS's determination that Rice's whales "occupied the Gulf of Mexico" at the time of listing.

The best available science demonstrates that the Rice's whale does not occupy the entire GOMx. As described in Ireland (2023):

> There are no available data to support that Rice's whales occur in shallower or deeper waters of the GOMx away from the continental shelf break. There have been no reported sightings in waters <100 m or >408 m deep (Rosel et al. 2021).[17]

NMFS previously agreed, stating in its 2019 listing determination that Rice's whales are "restricted primarily to a small region along the continental shelf break in the De Soto Canyon area" of the northeastern GOMx.[18] On August 11, 2023—just weeks after issuing the Proposed Rule—NMFS issued in its Rice's whale stock assessment report restating this conclusion:

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[8] 88 Fed. Reg. at 47,460 ("[W]e have determined that at the time of listing Rice's whales occupied the Gulf of Mexico.").

[9] The absence of any further specificity in the Proposed Rule with regard to locations of Rice's whale occupation in the GOMx together with the statutory requirement to identify the area "occupied by the species" before designating its critical habitat makes clear that NMFS is reaching *and relying on* a conclusion that Rice's whales occupy the *entire* GOMx. Should NMFS determine that Rice's whales do not occupy the entire GOMx, then it must issue a new proposed rule for public review and comment.

[10] 88 Fed. Reg. at 47,460; Critical Habitat Report at 8.

[11] On the Atlantic coast, two Rice's whale strandings were deemed insufficient by NMFS to reach an "occupied" finding despite expressing just months ago that the data were unclear. *Compare U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2022*, at 114 (June 2023), https://media.fisheries.noaa.gov/2023-08/Final-Atlantic-and-Gulf-of-Mexico-SAR.pdf ("Two strandings from the southeastern U.S. Atlantic coast share the same genetic characteristics with those from the northern Gulf of Mexico . . ., but it is unclear whether these are extralimital strays . . . or whether they indicate the population extends from the northeastern Gulf of Mexico to the Atlantic coast of the southern U.S. . . .." (citations omitted)) ("Stock Assessment Report"), *with* 88 Fed. Reg. at 47,458 (stating that Bryde's whales are "effectively absent from the U.S. east coast"). NMFS's sudden certainty that the Atlantic coast is not occupied while taking an entirely different approach to similarly limited data within the GOMx demonstrates the arbitrary nature of NMFS's use of limited scientific information.

[12] 88 Fed. Reg. at 47,460.

[13] *Id.*

[14] 50 C.F.R. § 424.02.

[15] *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1165 (9th Cir. 2010).

[16] *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 67 F.4th 1027, 1039 (9th Cir. 2023) (single jaguar sighting in nearby mountain range is not sufficient to determine that area is occupied several years later); *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 916-17 (D.C. Cir. 2011) (single sighting of four shrimp in one tire rut on the property four years after species' listing was not sufficient to designate land as occupied).

[17] Ireland (2023) at 11.

[18] *Endangered and Threatened Wildlife and Plants; Endangered Status of the Gulf of Mexico Bryde's Whale*, 84 Fed. Reg. 15,446, 15,460 (Apr. 15, 2019). NMFS revised the common name of the species from Bryde's whale to Rice's whale in 2021. *Endangered and Threatened Wildlife and Plants; Technical Corrections for the Bryde's Whale (Gulf of Mexico Subspecies)*, 86 Fed. Reg. 47,022 (Aug. 23, 2021).

> The species has a relatively restricted range within the northern Gulf of Mexico . . . Sighting records and acoustic detections of Rice's whales in the northern Gulf of Mexico (i.e., U.S. Gulf of Mexico) occur primarily in the northeastern Gulf in the De Soto Canyon area, along the continental shelf break between 100 m and 400 m depth, with a single sighting at 408 m . . ..[19]

Survey work confirms that Rice's whales are not found throughout the GOMx. From 2017 to 2018, 34,464 kilometers of aerial surveys of waters less than 200 meters deep and 19,576 kilometers of vessel-survey effort in waters deeper than 200 meters resulted in no Rice's whale sightings outside of the 100- to 400-meter water depth range.[20]

The Proposed Rule itself raises questions regarding whether the entire GOMx is occupied. For example, NMFS states that the 100- to 400-meter isobath area constitutes the Rice's whale's "restricted range," explaining that "Rice's whales *rely entirely* on the GOMx continental shelf and slope waters between the 100 and 400 m isobaths to support *all* of their life history stages."[21] Furthermore, NMFS states that Soldevilla et al. (2022b) "did not record Rice's whale calls at a site offshore of Grand Isle, Louisiana or during 2 months at a site in the north-central GOMx."[22] NMFS concedes that the absence of call detections at these sites "*could indicate an absence of Rice's whales*."[23] NMFS even lacks confidence that Rice's whales occupy parts of the northwestern GOMx shelf where it proposes to designate critical habitat, stating that predictive modeling only indicates that Rice's whales "may" occupy the 200-meter isobath area along the northwestern GOMx shelf break.[24]

NMFS cannot reconcile its conclusion that Rice's whales occupy the entire GOMx with its acknowledgment that Rice's whales may or may not occupy many parts of the GOMx (including areas proposed as critical habitat) or with its conclusions that Rice's whales are restricted to, and "rely entirely" on, northeastern GOMx for "all" of their life history needs.[25] Indeed, expecting the small population of Rice's whales to "occupy" the entire GOMx defies logic. Accordingly, NMFS's conclusion that the entire GOMx consists of "occupied" habitat is not supported by the best available science and is arbitrary and capricious.[26] This flawed conclusion—on which the Proposed Rule is fundamentally premised—undermines all of the subsequent analyses and conclusions in the Proposed Rule, rendering the entire Proposed Rule arbitrary and capricious.

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[19] Stock Assessment Report at 114; *see Final 2022 Marine Mammal Stock Assessment Reports*, 88 Fed. Reg. 54,592 (Aug. 11, 2023) (announcing release of Stock Assessment Report).

[20] Rappucci et al., U.S. Dep't of the Interior, BOEM, *Gulf of Mexico Marine Assessment Program for Protected Species (GoMMAPPS): Marine Mammals, Volume 1: Report*, OCS Study BOEM 2023-042 (June 2023).

[21] 88 Fed. Reg. at 47,461 (emphases added).

[22] *Id.* at 47,457.

[23] *Id.* (emphasis added); *see also* Critical Habitat Report at 8, 9 (contemporary sightings are primarily confined to the core distribution area in the northeastern GOMx, but Rice's whales "historically *may* have had a broader distribution" (emphasis added)).

[24] 88 Fed. Reg. at 47,457. NMFS recognizes in the Proposed Rule that *only two sightings* fell outside the 151- to 252-meter isobaths. *Id.* at 47,462.

[25] *See* 84 Fed. Reg. at 15,460 ("The best available scientific information . . . indicate[s] that Bryde's whales in the Gulf of Mexico are now restricted primarily to a small region along the continental shelf break in the De Soto Canyon area of the northeastern Gulf of Mexico."); 88 Fed. Reg. at 47,456-57 (acknowledging that Rice's whale core habitat "is considered to be in the northeastern GOMx, centered over the De Soto Canyon in waters between 150 m and 410 m depth"). Without a reasonable explanation for reversing its position, NMFS's conclusion that Rice's whales occupy the entire GOMx is arbitrary and capricious. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency must "display awareness that it is changing position" and provide a reasoned explanation for change in position); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("'An agency's view of what is in the public interest may change . . . But an agency changing its course must supply a reasoned analysis[.]'" (citation omitted)).

[26] NMFS's own Critical Habitat Report does not support a conclusion that the entire GOMx is occupied, finding only that a recent study concluded that Rice's whales "persistently occur over a broader distribution in the GOMx than was previously understood, which is documented to include both the northeastern and northwestern GOMx." Critical Habitat Report at 14. NMFS may not reasonably reach a determination that the entire Gulf of Mexico is occupied based on the information presented in the Critical Habitat Report.

B. NMFS has not demonstrated that it is proposing to designate "specific areas within" Rice's whale occupied habitat.

As described above, NMFS may only designate as "critical habitat" the "specific areas" that are "within" a broader geographical area that is occupied by a species.[27] As one court has explained:

> [T]he statute contemplates that the agency will first determine "the geographical area occupied by the species" and *then* proceed to identify the "areas *within* the geographical area occupied by the species" on which the [physical or biological features ("PBFs")] are found. 16 U.S.C. § 1532(5)(A)(i) (emphasis added). This reading is underscored by the governing regulations, which require the [U.S. Fish and Wildlife Service ("FWS")] to *begin* by "(i) [i]dentify[ing] the geographical area occupied by the species at the time of listing" and also "(ii) [i]dentify[ing] physical and biological features essential to the conservation of the species at an appropriate level of specificity using the best available scientific data." 50 C.F.R. § 424.12(b)(1). And it is only *after* the FWS has made these individual determinations that the regulations require FWS to "(iii) [d]etermine the specific areas within the geographical area occupied by the species that contain the physical or biological features essential to the conservation of the species."[28]

Although NMFS asserts that the Rice's whale "occupied the Gulf of Mexico" at the time of listing,[29] this conclusion is arbitrary, capricious, and not supported by the best available science, as demonstrated above. Consequently, NMFS may not rely on this unsupported conclusion to meet its obligation to designate a specific area "within" Rice's whale occupied habitat.

C. NMFS has not demonstrated that the central and northwestern GOMx continental shelf and slope are "occupied."

In the Proposed Rule, NMFS does not propose to designate unoccupied habitat, nor has it attempted to demonstrate that any unoccupied habitat is "essential for the conservation of the species,"[30] or that designating only occupied habitat would be "inadequate to ensure the conservation of the species."[31] Accordingly, NMFS may propose to designate critical habitat only in areas that are occupied by Rice's whales. However, NMFS has not demonstrated that the central and northwestern GOMx continental shelf and slope (as proposed for designation) are, in fact, occupied by Rice's whales. According to Ireland (2023):

> Based on sightings and acoustic detections (Rosel et al. 2021; Soldevilla et al. 2022a,b), the only habitat in which Rice's whales are known to consistently and regularly occur in the GOMx is the core habitat in the northeastern GOMx (Figure 1). As reviewed in Section 3, evidence of Rice's whale occurrence in the northwestern GOMx is based on infrequent and irregular acoustic detections (Soldevilla et al. 2022a,b) and a single confirmed sighting (NMFS 2018a). There is no evidence of persistent presence or a regular pattern of occurrence in the acoustic data (Soldevilla et al. 2022b) that would provide insight into how the whales use this area, such as for migration, seasonal foraging, or breeding.[32]

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[27] 16 U.S.C. § 1532(5)(A)(i); *see also N. Spotted Owl v. Lujan*, 758 F. Supp. 621, 623 (W.D. Wash. 1991) ("[C]ritical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention.").

[28] *Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 355, 371 (D.D.C. 2018) (citation omitted; emphasis in original; first, second, and third brackets added); *see also Ctr. for Biological Diversity*, 67 F.4th at 1038 ("For land to be classified as occupied critical habitat, it must be 'within the geographical area occupied by the species, at the time [the species] is listed.'" (brackets in original) (quoting 16 U.S.C. § 1532(5)(A)(i))); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119-20 (D.D.C. 2004) ("Whether and how an area becomes critical habitat first depends on whether a listed species occupies that area . . . [and] [o]nce the Service properly determines that a species occupies a candidate area for critical habitat, the Service must then determine that [PBFs] . . . are 'found' on specific areas *within* that area." (emphasis added)).

[29] 88 Fed. Reg. at 47,460.

[30] 16 U.S.C. § 1532(5)(A)(ii).

[31] 50 C.F.R. § 424.12(b)(2) ("The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species.").

[32] Ireland (2023) at 11.

The ESA's implementing regulations define the "geographical area occupied by the species" to mean an area "delineated around species' *occurrences*,"[33] not areas where modeling suggests a species may occur. The area must actually be "used" by the species with "sufficient regularity that it is likely to be present during any reasonable span of time."[34] NMFS's conclusions regarding the presence of Rice's whales in the central and northwestern GOMx continental shelf appear to be largely based on predictive modeling and not on sightings.[35] Just as the sighting of one or two individuals is insufficient to determine an area is occupied,[36] the absence of sightings or other evidence of occurrence in a "specific area" must also be insufficient. For these reasons, NMFS may not reasonably conclude that the central and northwestern GOMx continental shelf and slope are areas occupied by the Rice's whale.

D. NMFS has not demonstrated that the central and northwestern GOMx continental shelf and slope are "habitat."

The U.S. Supreme Court has confirmed that an area must be "habitat" in order to be "critical habitat."[37] The Proposed Rule does not support a conclusion that the entire area proposed for designation constitutes Rice's whale habitat. It is unknown how much of the GOMx continental shelf and slope-associated waters between the 100- and 400-meter isobaths actually support the life history parameters of the Rice's whale.[38] There is no direct evidence to show what Rice's whales are feeding on and whether that prey exists throughout the continental shelf and slope of the GOMx.[39] A critical habitat designation is arbitrary and capricious where, as here, it is based on oceanographic features (i.e., water depth) without analysis of whether specific areas actually support the species.[40]

Indeed, as noted above, NMFS has recognized that Rice's whales are "restricted primarily to a small region along the continental shelf break in the De Soto Canyon area" of the northeastern GOMx.[41] As explained in the Proposed Rule, the concentration of Rice's whales in the northeastern GOMx appears to be explained by "higher summer chlorophyll-a concentrations, an indicator of phytoplankton abundance and biomass in coastal and estuarine waters, . . . as compared to other regions in the GOMx with suitable bottom temperatures, but less surface productivity."[42] The unique De Soto Canyon physical structure and location result in recurring cold-water masses not known to occur anywhere else in the GOMx.[43] This habitat has been defined as "core habitat" for Rice's whales[44] and is the only area within the GOMx that the Proposed Rule demonstrates contains essential features needed to support the Rice's whale population. NMFS has failed to demonstrate that

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[33] 50 C.F.R. § 424.02 (emphasis added).

[34] *Ariz. Cattle Growers' Ass'n*, 606 F. 3d at 1165; *see also* 50 C.F.R. § 424.02 (the geographical area occupied by the species "may include those areas used throughout all or part of the species' life cycle" (emphasis added)).

[35] Ireland (2023) at 6-8. NMFS appears to be basing its designation outside of the northwestern GOMx primarily on the habitat-based density prediction model. *Id*. Ireland (2023) describes the significant limitations in the ability of such models to predict the presence of species outside of where survey effort or observations are made. *Id*. at 7-9. In addition, to the extent NMFS is basing its determination on limited acoustic data, that is insufficient to designate an area as occupied.

[36] *See supra* note 16.

[37] *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) ("'[C]ritical habitat' is the subset of 'habitat' that is 'critical' to the conservation of an endangered species.").

[38] Ireland (2023) at 12.

[39] *Id*.

[40] *See, e.g., Otay Mesa*, 344 F. Supp. 3d at 366 (critical habitat designation cannot be made "solely vis-a-vis the topography of the pertinent geographical [area] without further analysis of whether and to what extent the area actually functions as [a] watershed" that supports the species).

[41] 84 Fed. Reg. at 15,460; *see also* Stock Assessment Report at 114 (explaining that sightings and acoustic detections have primarily been documented in the De Soto Canyon area).

[42] 88 Fed. Reg. at 47,458.

[43] Ireland (2023) at 12 (citing Schroeder and Woods (2000)). The Mississippi River, Loop Current, and associated eddies cause mixing in this area, which in turn can lead to elevated productivity compared to surrounding areas, and variations in bottom features likely contribute to unique biological processes in the area that support Rice's whales. *Id.; see also* Critical Habitat Report at 6 (core habitat area "is characterized by seasonal advection of low salinity, high productivity surface waters (i.e., waters with high production of organic matter by planktonic plants), leading to persistent upwelling driven by both winds and interactions with the loop current").

[44] Critical Habitat Report at 6 (noting that Rice's whale core habitat is considered to be in the northeastern GOMx "centered over the De Soto Canyon in waters between 150 m and 410 m depth" (citing Rosel et al. (2021))). This area is also sometimes known as the "core distribution area." *Id*.

all of the area proposed for designation, and particularly the central and northwestern GOMx continental shelf and slope, even qualify as "habitat," much less "occupied habitat" or "critical habitat."

E. NMFS may not circumvent the ESA's requirement to identify essential features "found" in proposed critical habitat areas by calling such features "attributes."

In order to designate an area as critical habitat, NMFS must find that it includes "those physical or biological features [PBFs] (I) essential to the conservation of the species and (II) which may require special management considerations or protection."[45] PBFs are those "features that occur in specific areas and that are essential to support the life-history needs of the species."[46] It is well settled that those features must be "found" in the specific areas proposed for designation;[47] NMFS may not "rely on hope" that PBFs will "likely be found in the future."[48]

In the Proposed Rule, NMFS identifies a single "essential feature" of Rice's whale habitat—the GOMx continental shelf and slope from the 100- to 400-meter isobath.[49] This is indeed an oceanographic feature that is very easy to "find" on a map, but it does not constitute an appropriate PBF without evidence demonstrating that each part of it is "essential" to the species. Instead of satisfying that requirement, however, NMFS simply states that the whole area qualifies as "essential" to the species "[b]ecause Rice's whales rely entirely on the GOMx continental shelf and slope waters between the 100 and 400 m isobaths to support all of their life history stages . . . ."[50] This circular argument—that this location qualifies as essential to Rice's whales because it is relied on by Rice's whales—does not meet the ESA's requirement to identify the actual "physical or biological features" that are "essential to the species" and that *cause* Rice's whales to use the specific locations within the GOMx proposed for designation.[51]

After identifying the GOMx continental shelf and slope as "essential," NMFS acknowledges that certain "attributes" of the area "influence the value" of the GOMx continental shelf and slope "to the conservation of the species."[52] According to NMFS, these "attributes" are (1) prey availability, (2) water characteristics, and (3) quiet conditions.[53] NMFS states that these three attributes "support Rice['s] whales' ability to forage, develop, communicate, reproduce, rear calves, and migrate throughout the GOMx continental shelf and slope waters."[54] Despite their importance to the habitat's value, however, NMFS makes no attempt to identify where, within the proposed critical habitat designation, each of these key habitat attributes can be found. Tellingly, each of the features that NMFS says is a mere "attribute" of PBF in the Proposed Rule is commonly identified by NMFS as a PBF itself in other critical habitat rules.[55] In fact, the definition of "[p]hysical or biological features essential to the conservation of the species" refers to "water characteristics" and "prey" as examples of such features.[56]

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[45] 16 U.S.C. § 1532(5)(A)(i).

[46] 50 C.F.R. § 424.02.

[47] 16 U.S.C. § 1532(5)(A)(i) (providing for designation of "the specific areas within the geographical area occupied by the species, at the time it is listed . . . *on which are found* those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection" (emphasis added)); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv*., 268 F. Supp. 2d 1197, 1214-15 (E.D. Cal. 2003) (PBFs must be "found" on occupied land before that land can be eligible for critical habitat designation), *disapproved of on other grounds by Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv*., 616 F.3d 983, 988 (9th Cir. 2010).

[48] *Cape Hatteras*, 344 F. Supp. 2d at 122-23 (finding it improper to "cast a net over tracts of land with the mere hope that they will develop [PBFs]").

[49] 88 Fed. Reg. at 47,471 (proposing new regulations at 50 C.F.R. § 226.230(b) describing the "essential feature" of the critical habitat); Critical Habitat Report at 17.

[50] 88 Fed. Reg. at 47,461; Critical Habitat Report at 15.

[51] 16 U.S.C. § 1532(5)(A)(i).

[52] 88 Fed. Reg. at 47,461.

[53] *Id*.

[54] *Id*.

[55] *See, e.g.*, 50 C.F.R. § 226.203(a) (identifying physical oceanographic conditions such as currents and circulation patterns, bathymetric features, and temperatures as a PBF for the North Atlantic right whale); *id*. § 226.211(c) (listing specific water quality conditions as essential elements of California salmon critical habitat); *id*. § 226.206(b) (identifying water quality as essential feature of critical habitat for Southern Resident killer whale critical habitat); *id.* (identifying prey species as essential feature of Southern Resident killer whale critical habitat); *id*. § 226.227(f) (identifying prey species as essential feature of Pacific humpback whale habitat); *id*. § 226.215(a) (identifying prey species found within North Pacific right whale habitat).

[56] *Id*. § 424.02.

NMFS may not sidestep the ESA's obligation to demonstrate the specific locations on which essential features are "found" by identifying a large oceanographic feature as a PBF and then describing that large area's essential features as "attributes" without making any attempt to identify the specific areas where they occur within that large area.[57] Such an approach both evades and violates the ESA's clear edict to identify "the specific areas" where essential features are "found."[58]

F. The existence of "sufficiently quiet conditions" is not a PBF.

As part of the continental shelf and slope PBF, the Proposed Rule identifies as an attribute "[s]ufficiently quiet conditions for normal use and occupancy, including intraspecific communication, navigation, and detection of prey, predators, and other threats."[59] NMFS explains that sound "impair[s] sufficiently quiet conditions for normal use and occupancy" if it inhibits the whale's ability to "receive and interpret sound for the purposes of navigation, communication, and detection [of] prey, predators, and other threats."[60] This is not an essential feature for purposes of critical habitat designation.

First, in-water sound is not an element of habitat but rather the result of natural and anthropogenic sound introduced to the marine environment that has the potential to affect marine mammals and other species. Likewise, the existence of "sufficiently quiet conditions" is not a "feature" that can be "found" in a "specific area."[61] Indeed, rather than identifying where, within the proposed critical habitat, such conditions currently exist, NMFS describes a range of acoustic frequencies that are "most likely to adversely affect" the whale's acoustic soundscape.[62] In doing so, NMFS implicitly recognizes that sound results in direct impacts to individuals and that the absence of sound is not a habitat feature that can be "found" in a specific geographic location.

In recent years, NMFS has declined to identify the absence of sound as a PBF for a variety of species, despite recognizing the significance of in-water sound to those species.[63] Nor has NMFS identified the absence of sound as a PBF for any other baleen whale, including the North Pacific right whale, the North Atlantic right whale, or any of three populations of humpback whale.[64] In fact, NMFS specifically rejected requests to identify the absence of sound as an element of critical habitat for the Southern Resident killer whale because the effects of sound "are direct effects to the animal itself and not to its habitat."[65]

Second, the purpose of the ESA's critical habitat provision is to identify and locate geographically those "specific areas" in which essential "physical or biological features" are found.[66] These features must be characteristics that can be located within the critical habitat area at the time of designation.[67] Yet the Proposed Rule does not describe *specifically* where "sufficiently quiet conditions" currently exist (or do

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[57] This is equivalent to identifying a terrestrial species' occupied habitat as an entire mountain range, identifying land above a certain altitude as its PBF, and then describing the specific habitat features it actually depends upon as "attributes" without identifying where they occur within the mountain range.

[58] 16 U.S.C. § 1532(5)(A)(i).

[59] 88 Fed. Reg. at 47,461.

[60] *Id.*

[61] 16 U.S.C. § 1532(5)(A)(i).

[62] 88 Fed. Reg. at 47,461.

[63] *See* 88 Fed. Reg. 46,572 (July 19, 2023) (green sea turtle (proposed rule for six distinct population segments)); 87 Fed. Reg. 19,180 (Apr. 1, 2022) (bearded seal); 87 Fed. Reg. 19,232 (Apr. 1, 2022) (ringed seal); 86 Fed. Reg. 21,082 (Apr. 21, 2021) (humpback whale); 86 Fed. Reg 41,668 (Aug. 2, 2021) (Southern Resident killer whale).

[64] 73 Fed. Reg. 19,000 (Apr. 8, 2008) (North Pacific right whale); 59 Fed. Reg. 28,793 (June 3, 1994) (North Atlantic right whale); 86 Fed. Reg. 21,082 (Apr. 21, 2021) (humpback whale).

[65] *Endangered and Threatened Species; Designation of Critical Habitat for Southern Resident Killer Whale*, 71 Fed. Reg. 69,054, 69,055 (Nov. 29, 2006). NMFS previously used the term "primary constituent element" or "PCE," which has the same meaning as PBF. *See Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat*, 81 Fed. Reg. 7,414, 7,426 (Feb. 11, 2016) (change in terminology from PCE to PBF "is not intended to substantively alter anything about the designation of critical habitat").

[66] 16 U.S.C. § 1532(5)(A)(i); *see also* 50 C.F.R. § 424.12(b)(1)(iii) (requiring determination of "the specific areas within the geographical area occupied by the species that contain the physical or biological features essential to the conservation of the species"); 81 Fed. Reg. at 7,420 (in designating critical habitat, NMFS and U.S. Fish and Wildlife Service will determine which areas "contain" the features essential to conservation of the species).

[67] *See Cape Hatteras*, 344 F. Supp. 2d at 122-23 (U.S. Fish and Wildlife Service must observe essential feature in critical habitat area at the time of designation).

not exist) within the proposed critical habitat area.[68] Moreover, as NMFS acknowledges, the westernmost sites within the core area studied by Soldevilla et al. (2022b) are "not far from a major shipping fairway and vessel traffic noise was common in the recordings at those sites."[69] Therefore, the "quiet conditions" that NMFS seeks to protect demonstrably are *not* "found" in some areas of the proposed critical habitat area, nor are they identified with any specificity as required by the ESA.

Third, marine sound is a complex and dynamic phenomenon that is heavily affected by salinity, pressure, and natural temperature gradients the further away the water column is from heat sources such as the sun. Cetaceans such as Rice's whales are known to utilize and exploit sound layers and gradients to their advantage in hunting and hiding from potential harm.[70] To characterize "sufficiently quiet conditions" as an "attribute" or element of Rice's whale critical habitat demonstrates a concerning lack of scientific understanding of how cetaceans are known to utilize both layers and areas of the ocean that are both quieter and less quiet than the average.

G. NMFS's economic analysis is inconsistent with its own assumptions and fails to account for significant project modifications and other economic costs resulting from a critical habitat designation.

Before designating habitat, ESA section 4(b)(2) "imposes a categorical requirement that the Secretary tak[e] into consideration economic and other impacts before such a designation."[71] NMFS must consider the economic impact of a designation and may exclude areas from the designation if the benefits of exclusion outweigh the benefits of designating the area.[72] Specifically, section 4(b)(2) of the ESA requires NMFS to consider the economic impact of designating an area as critical habitat by comparing impacts with and without the critical habitat designation (the "4(b)(2) Analysis").[73]

NMFS provides the 4(b)(2) Analysis in its Critical Habitat Report,[74] which is also summarized in the Proposed Rule.[75] Unfortunately, NMFS's 4(b)(2) Analysis falls materially short of the statutory and regulatory requirements by dismissing the potential for substantive modifications to federally permitted activities and associated economic costs.[76] The proposed critical habitat designation will cause such modifications and, in fact, has already resulted in such modifications, as described below.

The Proposed Rule identifies federally permitted oil and gas exploration and development as an activity that has the potential to affect essential features of the Rice's whale proposed critical habitat.[77] NMFS cites to these and other activities in reaching a conclusion that the critical habitat designation is necessary to provide "special management considerations or protections" to Rice's whale habitat.[78] Specifically, NMFS states that "conservation measures might be required in the future through section 7 consultations on particular proposed Federal actions," including energy development activities.[79] NMFS describes energy development as one activity that could "result in the need for special management or protections of the essential feature" of the proposed critical habitat.[80]

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[68] *See* 88 Fed. Reg. at 47,461; Critical Habitat Report at 15.

[69] 88 Fed. Reg. at 47,457 (noting the apparent presence of shipping and airgun sound in this area).

[70] *See* Richardson, W. J., C. R. Greene, Jr., C. I. Malme, and D. H. Thomson. 1995. Marine mammals and noise. Academic Press, San Diego, CA.; Southall, B.L., D.P. Nowacek, A.E. Bowles, V. Senigaglia, L. Bejder, P.L. Tyack. 2021. Marine Mammal Noise Exposure Criteria: Assessing the Severity of Marine Mammal Behavioral Responses to Human Noise. Aquatic Mammals 47(5): 421-464.

[71] *Weyerhaeuser*, 139 S. Ct. at 371 (brackets in original; internal quotation marks and citation omitted).

[72] 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.19(b).

[73] 16 U.S.C. § 1533(b)(2).

[74] Critical Habitat Report at 21-56.

[75] 88 Fed. Reg. at 47,463-67.

[76] Critical Habitat Report at 35 (proposed critical habitat "will not change the outcome of Section 7 consultations, and additional project modifications will not be necessary"); *id*. at 39 ("[W]e anticipate that incremental costs associated with oil and gas exploration and production as a result of the Rice's whale critical habitat will be limited to administrative costs of consultation.").

[77] 88 Fed. Reg. at 47,464.

[78] *Id*. at 47,461-62 (providing analysis under 16 U.S.C. § 1532(5)(A)(i)); *see also* Critical Habitat Report at 16.

[79] 88 Fed. Reg. at 47,462.

[80] *Id*.

Despite this, NMFS concludes that the Proposed Rule "is not anticipated to result in incremental project modifications."[81] NMFS appears to base this conclusion in relevant part on an assumption that most project modifications resulting from an ESA section 7 consultation would already be required to protect the species and therefore cannot be attributed solely to the designation of critical habitat.[82] As a result, NMFS asserts that it does "not expect designation of critical habitat for the Rice's whale to result in project modifications for any of the activities that may affect the critical habitat . . . so long as such actions do not result in the destruction or adverse modification of critical habitat."[83] Indeed, NMFS estimates the overall incremental costs to all activities from the critical habitat designation at merely $37,000 in annualized costs.[84] NMFS cannot rationally conclude that modifications to energy development activities are both necessary to manage and protect habitat *and* that the critical habitat designation will not result in significant changes to those same activities.[85]

In addition, NMFS's caveat that project modifications are not expected "so long as such actions do not result in the destruction or adverse modification of critical habitat"[86] exemplifies NMFS's failure to analyze the very scenarios that the statute contemplates could result in economic costs—*i.e.*, where measures may be imposed because an action may destroy or adversely modify critical habitat. As NMFS understands, a proposed action that is expected to result in destruction or adverse modification of critical habitat may not move forward as originally proposed. Instead, either (1) the action agency or applicant will modify the proposed action to bring potential impacts of a proposed action under the "adverse modification" threshold,[87] or (2) NMFS will propose a "reasonable and prudent alternative," which must be adopted by the action agency in order for the activity to move forward.[88] Either of these scenarios would require significant project changes to avoid impacts that purportedly rise to a level of "adverse modification,"[89] but NMFS's 4(b)(2) Analysis entirely fails to describe the cost or impact of these anticipated modifications in any way.[90] This is a material failure and NMFS may not move forward with a final

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[81] *Id*. at 47,467.

[82] *Id*. at 47,464 ("When the same modification would be required due to impacts to both the species and critical habitat, there would be no additional or incremental impact attributable to the critical habitat designation beyond the administrative impact associated with conducting the critical habitat analysis."); *see also* Critical Habitat Report at 34.

[83] 88 Fed. Reg. at 47,465.

[84] Critical Habitat Report at 22.

[85] Although NMFS is not correct that designation of Rice's whale critical habitat will result in no new requirements, if it were correct, then its determination under 16 U.S.C. § 1532(5)(A)(i) that "special management measures" are needed to protect essential features is arbitrary. *See* 88 Fed. Reg. at 47,461-62. Congress certainly did not intend for NMFS to meet its obligation under that provision by merely asserting that measures may be needed while also knowing that the critical habitat designation will not require such measures. In short, NMFS cannot rationally conclude that *both* economic costs from the designation are *de minimis* and special management measures may be required.

[86] 88 Fed. Reg. at 47,465.

[87] *See* 50 C.F.R. § 402.14(g)(8) (requiring Service to take into account beneficial actions proposed by the action agency or applicant when formulating its biological opinion). In its 4(b)(2) Analysis, NMFS calls this the "incremental impact" of critical habitat designation, *i.e.*, "the extent to which Federal agencies modify their proposed actions to ensure they are not likely to destroy or adversely modify the critical habitat beyond any modifications the agencies would make because of listing and the requirement to avoid jeopardy to the Rice's whale." 88 Fed. Reg. at 47,464; *see also* Critical Habitat Report at 21.

[88] 16 U.S.C. § 1536(b)(3)(A) ("If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate" section 7(a)(2), the prohibition against jeopardy and adverse modification); *Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 476 (E.D. Cal. 2018) (If a biological opinion concludes that the action would "destroy or adversely modify critical habitat, . . . then the action may not go forward unless the wildlife agency can suggest a 'reasonable and prudent alternative[]' ('RPA') that avoids jeopardy, destruction, or adverse modification." (brackets in original; citation omitted)).

[89] "Adverse modification" findings are consequential and necessarily indicate that significant project changes are required in order for a proposed action to proceed. *See Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat*, 79 Fed. Reg. 27,060, 27,063 (May 12, 2014) (to adversely modify critical habitat, an action "must in some way cause the deterioration of the critical habitat's pre-action condition, which includes its ability to provide recovery support to the species").

[90] *See generally* 88 Fed. Reg. at 47,464-65; Critical Habitat Report at 21-56 & 39 ("[W]e anticipate that incremental costs associated with oil and gas exploration and production as a result of the Rice's whale critical habitat will be limited to administrative costs of consultation."). NMFS's conclusion that the proposed critical habitat "will not change the outcome of Section 7 consultations, and additional project modifications will not be necessary," Critical Habitat

Continued

critical habitat designation without first analyzing and providing for public review and comment a 4(b)(2) Analysis that properly considers the full economic costs likely to result from the proposed designation.

Moreover, even in the absence of an "adverse modification" finding, a critical habitat designation or proposal can cause federal agencies to impose new, precautionary measures that are economically significant and must also be considered. On August 23, 2023, the Bureau of Ocean Energy Management ("BOEM") issued a lease stipulation in the Final Notice of Sales ("FNOS") for GOMx Lease Sale 261 that includes burdensome new operating restrictions across a newly defined and vastly enlarged "Expanded Rice's Whale Area."[91] This area—which is more than double the size of the Rice's whale area identified in BOEM's Proposed Notice of Sale ("PNOS")—appears to be identical to the area that NMFS is proposing for designation as Rice's whale critical habitat.[92] As BOEM's PNOS did not include these measures, and as they match the geographic area proposed for critical habitat designation, it is reasonable to conclude that BOEM added these conservation measures to its FNOS in whole or in part as a result of NMFS's critical habitat proposal.[93] Alternatively, it is reasonable to conclude that any such measures that are currently not required will become required as terms and conditions in future biological opinions that are imposed on the regulated community, as a direct result of the critical habitat designation.

NMFS accurately predicts that the implications of underestimating the costs of a critical habitat designation are "[p]otentially major."[94] Oil and gas activities in the GOMx account for approximately 15 percent of U.S. crude production and 5 percent of U.S. dry natural gas production.[95] At least 2,400 companies across all 50 states are dependent on GOMx-derived production as part of their supply chain.[96] In 2023, the GOMx oil and gas industry supported approximately 412,000 jobs and will generate an estimated $34.3 billion in gross domestic product and over $6.1 billion in government revenue.[97] As demonstrated in Attachment B to these comments, restrictions on oil and gas activities in the northwestern and central GOMx, including a 10-knot speed restriction, limitations on transit from dusk to dawn and during periods of low visibility, and other restrictions on transiting vessels,[98] are estimated to cost the oil and gas industry up to $9.4 billion annually, result in a loss of up to 101,000 jobs, and reduce government revenues up to $8.7 billion annually.[99] Furthermore, BOEM has now withdrawn from Lease Sale 261 all acreage falling within this expanded area (for a total of approximately six million acres),[100] which also appears to stem from the proposed critical habitat designation. This represents lost development opportunities and lost federal and state government revenues in the range of hundreds of millions of dollars.

NMFS must evaluate the economic and other relevant impacts of these conservation measures in a revised proposal, and propose any warranted exclusions based on that new analysis, before finalizing Rice's whale critical habitat. Failure to do so will violate the ESA's requirement to consider the economic impact of designating

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Report at 35, directly contradicts its statement that "conservation measures might be required in the future through section 7 consultations on particular proposed Federal actions," 88 Fed. Reg. at 47,462.

[91] *Final Notice of Sale Gulf of Mexico Oil and Gas Lease Sale 261 Lease Stipulations*, Stipulation 4(B)(4) (describing measures required in "Expanded Rice's Whale Area") ("Lease Sale 261 Stipulations"). These requirements have been preliminarily enjoined. *See supra* note 3.

[92] Lease Sale 261 Stipulations at Fig. 1 (identifying the northeastern GOMx Rice's whale habitat from NMFS's 2020 biological opinion and a "Rice's Whale Expanded Area" that appears to match the remainder of NMFS's proposed Rice's whale critical habitat designation); *cf.* BOEM, Proposed Notice of Sale Gulf of Mexico Oil and Gas Lease Sale 261 Lease Stipulations, Stipulation 4(B).

[93] Such measures, added in advance of an ESA section 7 consultation (or, in the present case, a reinitiated consultation) are referred to by NMFS as "conservation measures," which are actions incorporated into a proposed action by a federal agency and which minimize or compensate for project effects. *See* Critical Habitat Report at 29.

[94] Critical Habitat Report at 54.

[95] U.S. Energy Information Administration, Gulf of Mexico Fact Sheet (June 21, 2023), https://www.eia.gov/special/gulf_of_mexico/.

[96] Energy and Industrial Advisory Partners, *The Economic Impacts of the Gulf of Mexico Oil and Natural Gas Industry*, at 69-86 (May 26, 2020), https://www.noia.org/wp-content/uploads/2020/05/The-Economic-Impacts-of-the-Gulf-of-Mexico-Oil-and-Natural-Gas-Industry-2.pdf.

[97] EIAP (2023) at 4-5.

[98] Lease Sale 261 Stipulations, Stipulation 4(B)(4).

[99] EIAP (2023) at 2, Table 1.

[100] *See* Final Gulf of Mexico Oil and Gas Lease Sale 261 27 September 2023 Stipulations and Deferred Blocks (map illustrating that "Extended Rice's Whale Area" is not among lease tracts offered for sale and subject to stipulations). This acreage withdrawal has also been preliminarily enjoined. *See supra* note 3.

an area as critical habitat by comparing impacts with and without the critical habitat designation.[101] But at the very minimum, if NMFS evades its ESA responsibilities and proceeds with a final designation without a full assessment of the economic costs, the proposed designation of critical habitat across the central and northwestern continental shelf and slope of the GOMx should be excluded from the designation.[102] It cannot be disputed that designation of critical habitat across that area will result in significant impacts, and thus costs, to many industries and thousands of vessels that transit that area every day. The Proposed Rule identifies no benefits to designating that area as "critical habitat" and, as explained above, actually demonstrates that there are no such benefits given the extremely rare and questionable Rice's whale detections (much less demonstration of essential features) in that area. Therefore, even the *de minimis* costs NMFS has found, much less the *actual* costs that will be incurred, outweigh any benefits of a designation of the central and northwestern shelf and slope of the GOMx.[103]

IV. CONCLUSION

For the reasons set forth above, the Proposed Rule is overbroad, not based on the best available science, and arbitrary and capricious, in violation of the APA and the ESA. The Associations request that NMFS withdraw the Proposed Rule and reissue a proposed rule that complies with the APA, the ESA, and NMFS's implementing regulations.

We appreciate your consideration of these comments. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

Holly Hopkins
Vice-President, Upstream Policy
American Petroleum Institute

Erik Milito
President
National Ocean Industries Association

Dustin Van Liew
Vice President, Global Policy & Government Affairs
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Dan Naatz
COO and SVP of Government Relations and Political Affairs
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This letter along with all the attachments can be viewed on the Committee Repository at:

https://docs.house.gov/meetings/II/II13/20231025/116441/HHRG-118-II13-20231025-SD007.pdf

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[101] 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.19(b).

[102] NMFS has also failed to prepare a Statement of Energy Effects as required by Executive Order No. 13,211. *See* Exec. Order No. 13,211 (May 18, 2001) (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use).

[103] The Associations want to make clear that they vigorously oppose designation of that area in the first place, for the reasons stated elsewhere in this letter.

Review of the Rice's Whale Proposed Critical Habitat and Related Scientific Literature

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The full report can be viewed on the Committee Repository at:
https://docs.house.gov/meetings/II/II13/20231025/116441/HHRG-118-II13-20231025-SD008.pdf

The Economic Impacts of Gulf of Mexico Oil and Natural Gas Vessel Transit Restrictions

Prepared By

EIAP

Energy & Industrial Advisory Partners

The full report can be viewed on the Committee Repository at:
https://docs.house.gov/meetings/II/II13/20231025/116441/HHRG-118-II13-20231025-SD009.pdf

QUESTIONS SUBMITTED FOR THE RECORD TO ALEXANDRIA E. LOUREIRO, PHD, SCIENTIFIC DIRECTOR, ENERGEO ALLIANCE

Questions Submitted by Representative Carl

Question 1. I would like to address a matter of significant concern related to the potential negative consequences resulting from the Biden administration's leasing plan, particularly Lease Sale 261, which affects the Gulf of Mexico. It has come to our attention that the proposed regulations for Rice's whale critical habitat may not be based on sound scientific evidence, potentially leading to massive impacts in the oil and gas industry. Given the apparent lack of a strong scientific foundation for the proposed regulations on Rice's whale critical habitat, what steps do you believe are firmly rooted in sound science and protect both the environment and industry interests?

Answer. The EnerGeo Alliance and its members agree that the proposed Rice's whale critical habitat designation does not rely on the best available science and merits reevaluation. I came to that conclusion after a careful scientific review of all the available data regarding Rice's whales in the Gulf of Mexico. Below, I first summarize my scientific findings. I then describe the appropriate measures that should be applied, based on sound science.

Designation of 28,000 square miles throughout the Gulf of Mexico as critical habitat for 51 individuals—550 square miles *per animal*—is overly broad and does little to enhance conservation of the species. Historical detection data from Protected Species Observers in the Gulf of Mexico indicate that only one Rice's whale was reported for every 12,951 hours of observation. Further, these observations were not confirmed, and, given that a second study indicated a nearly 70% error rate (*i.e.*, only three in ten reported Rice's whales were in fact Rice's whales), these sightings become even more rare. By comparison, detections of other protected species occur about once per every 50 hours of observation.

Acoustic detections, presented as evidence of Rice's whale presence outside of the De Soto Canyon, clearly indicate a much lower rate of detection in the western Gulf of Mexico. Call detection rates at the Flower Garden West site were the highest reported outside of the De Soto Canyon, and the detection rate was 34 times lower than the detection rate within the De Soto Canyon. Detection rates were even lower at the other sites, and, importantly, *zero* calls were detected at the central site in over 9,000 hours of observation.

The best available data therefore do not suggest substantial presence of Rice's whales outside of the De Soto Canyon, much less the presence of "essential" Rice's whale habitat features outside of the De Soto Canyon. Although a critical habitat designation itself does not impose new measures, it could cause the agency to impose new measures in the designated area, as evidenced by BOEM's attempt to impose lease stipulations in the same area that has been proposed for critical habitat designation. Imposition of speed and transit restrictions in this area will not substantively improve the conservation of the species. However, such measures *are* likely to *increase* the number of interactions with other species by keeping vessels at sea for protracted periods of time. Further still, extending the duration of surveys will increase environmental emissions from operations, contributing to broader global climatological effects. Thus, such restrictions will cause more harm than good for both the environment and industry. Indeed, NOAA Fisheries recently concluded as much by *declining* a petition to establish a Rice's whale speed restriction for all vessels inside and outside the De Soto Canyon.

The types of measures that are most consistent with the best available science are risk- and evidence-based mitigation measures, including the use of Protected Species Observers and Passive Acoustic Monitoring Operators during geophysical surveys, and endeavoring to maintain separation from sighted animals when doing so would not present a risk to human safety. The energy geoscience industry already employs these measures in the Gulf of Mexico. Additional measures such as speed restrictions may be appropriate in areas that are known to have a dense concentration of individuals at a certain time. In this case, the De Soto Canyon is the only area in which Rice's whales are known to congregate, and NOAA Fisheries has already declined to impose such a measure on all vessels. Imposing speed limits *only* on oil and gas industry vessels is illogical, and would negatively impact overall conservation efforts.

Question 2. The draft legislation proposed by Congressman Graves is a step in the right direction to address this issue. What impact do you believe it could have on mitigating the potential negative consequences we've discussed today?

Answer. The proposed legislation would appropriately limit the imposition of reflexive agency actions that are not based on the best available science. As summarized above, the best available science shows that Rice's whales rarely inhabit areas outside De Soto canyon and there is a lack of evidence of Rice's whale "essential" habitat features outside that area. Yet, federal agencies, such as NMFS and BOEM, have reflexively proposed actions—such as the critical habitat designation and lease stipulations with vessel speed restrictions—outside De Soto canyon based on unsupported and speculative assumptions. There should be an unbiased review of the best available information and further scientific research to better understand the range and essential habitat features of the Rice's whale outside De Soto canyon.

Publication in peer-reviewed literature is a necessary step of the scientific process. Evaluation by experts and subsequent availability to the public ensures that high standards are maintained and regulatory decisions are made based on scientific evidence. That the current critical habitat proposed rule and lease stipulations rely so heavily on data that have not yet undergone peer review speaks to the insufficiency of the proposal.

EnerGeo firmly supports the continuation of Rice's whale research via partnership with the National Academies of Science, Engineering, and Medicine to conduct a study to determine the occurrence of Rice's whales in the region. Rice's whales are indeed an endangered and unique species, and merit protection based in sound, peer-reviewed science. A partnership with NAS will facilitate a more complete understanding of the species. Using these data, regulators can develop additional mitigation measures that may be needed (if any) and are likely to benefit the conservation of the species—rather than imposing overly broad measures that are not likely to conserve Rice's whales and are far more likely to lead to unintended deleterious effects.

Overly broad restrictions applied to a single industry are not likely to benefit Rice's whales. However, the uncertainty generated when restrictions are imposed via an extra-regulatory process (*i.e.*, the Stipulated Agreement to Stay Proceedings) will decrease the desire to invest in American energy. The U.S. Gulf of Mexico produces some of the lowest emissions oil in the world, and companies are held to the highest environmental and human safety standards. Driving that investment to other nations where these standards do not exist will ultimately lead to far greater environmental harm. The draft legislation is important because it puts a pause on new agency actions that are not based on the best available science and requires that the appropriate scientific steps (such as unbiased research and peer review) first be taken before any additional actions are taken.

Mr. BENTZ. Thank you. I thank the witnesses for their testimony. I will now recognize Members for 5 minutes each for questions.

Mr. McClintock, you are recognized for 5 minutes.

Mr. MCCLINTOCK. Thank you, Mr. Chairman.

Mr. Birmingham, your testimony states that treating individual artificially propagated fish or animals the same as naturally propagated ones has the potential to facilitate the conservation and recovery of listed species. How could treating artificially propagated fish or animals the same as naturally propagated ones contribute to the conservation and recovery of a listed species?

Mr. BIRMINGHAM. Mr. McClintock, as you pointed out in your remarks regarding H.R. 520, artificial propagation has the great potential of improving genetic diversity. As an example, my experience is primarily in California dealing with fish species listed under the Act. And I spoke in my testimony about Livingston Stone National Fish Hatchery.

If you look at their fish hatchery plan, the Fish and Wildlife Service and NOAA Fisheries makes the point, and I will quote, if I may, "Reintroductions contribute to preservation and

conservation by improving spatial structure, productivity, diversity, and abundance, thereby reducing the likelihood of extinction of the winter-run Chinook salmon." I paraphrased part of that, the reference to the winter-run salmon. But the reintroductions that they are talking about in that sentence are the reintroduction of artificially propagated fish.

The other benefit of artificially propagated species, or the other way in which it can promote conservation, is dealing with factors that can't be controlled in a more natural environment. As an example, in 2022, the winter-run juvenile population was almost decimated, and everyone thought, well, it is temperature. NOAA Fisheries did an analysis, and they ultimately concluded 17 percent of the juvenile mortality was caused by temperature; approximately 49 percent was caused by thiamin deficiency, and the thiamin deficiency resulted from the prey species that salmon were eating in the ocean. And when the salmon returned, the smolts and fries ultimately suffered from thiamin deficiency. To treat that, they are utilizing hatcheries. And without those hatcheries, this is a limiting factor that couldn't be addressed.

And if I can take more of your time, Mr. McClintock, as an example, Mr. Roady talked about *TVA v. Hill*, and what he said about *TVA v. Hill* was absolutely correct. But let's talk about, as Paul Harvey used to say, the rest of the story. What happened after the Supreme Court's decision in *TVA v. Hill*? Congress enacted a statute exempting Tellico Dam from the Endangered Species Act. Congress thought it was in its purview to make the decision related to whether or not that dam should go forward.

So, to save the species, the snail darter, they collected them, relocated them, and essentially began an artificial propagation program through the relocation. And, ultimately, I believe it was in 1985, the snail darter was delisted. So, the construction of the Tellico Dam did not cause the extinction of the snail darter because the Services intervened. They were able to preserve that species.

Mr. MCCLINTOCK. By the way, it is what we all learned in high school biology. The greater the genetic diversity, the more that nature can, through the natural selection process, select those characteristics that make that species resilient even in the face of changing conditions. So, if you restrict that genetic diversity, then you are actually making it more difficult for that species to adapt. You are actually running counter to the Endangered Species Act's goals.

Mr. BIRMINGHAM. Yes. And as I said in my testimony, H.R. 520 represents Congress making a policy judgment, as opposed to an administrative agency making a policy judgment. And in the context of the snail darter, that policy judgment ultimately did not lead to the extinction of that species.

Mr. MCCLINTOCK. I yield back.

Mr. BENTZ. Thank you. The Chair recognizes Ranking Member Huffman for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman.

Professor Roady, I want to ask you about the distinction between artificial propagation, like hatcheries, as a conservation tool in situations where you are doing triage to try to keep a species from going extinct or maybe to reintroduce it, and using these devices

as the destination essentially, the goal for compliance with the ESA.

Taken to, I guess, an extreme, maybe an absurd extreme, if you actually thought that artificial propagation was a sufficient outcome, and destination, and end goal, you could extirpate any number of species in the wild as long as you were checking the box and turning up the production meter in the hatchery enough to hit your numbers. Is that how the ESA was meant to be interpreted and applied?

Mr. ROADY. Thank you for the question, Mr. Huffman, and, of course, the answer is no. That is not the way it is supposed to work.

And you are absolutely right. The central flaw, and there is a distinction between doing a triage, as was done in the case of the Tellico Dam, and between doing what H.R. 520 would allow you to do, which is to basically allow these artificially created creatures to substitute for the wild creatures.

The essential problem, and the reason it runs completely counter to the Endangered Species Act, is that it overlooks the most important part of the Act, which is to conserve and protect the ecosystems in the wild in which these animals live, to preserve them in nature, as it were. And the salmon is the perfect example.

If you take out all the wild salmon, you lose that entire web of life process where the salmon go back to the sea, they come back, they contribute to the life in the sea. They bring nitrogen back, way back into Idaho and help the forests grow. They don't feed the animals along the way. You cut all that out if you are just using these artificially.

Mr. HUFFMAN. And the ESA is also about habitat, isn't it?

Mr. ROADY. Absolutely.

Mr. HUFFMAN. Not just about the numbers game on populations.

Mr. ROADY. Absolutely correct. You have to have the habitat to support the species.

So, H.R. 520 creates a lot of mischief, I would say.

Mr. HUFFMAN. Now, Mr. Birmingham, I appreciate you bringing up some conservation success stories where hatcheries played a really critical role. I agree with you in all of those cases. I am pretty familiar with the condor that has been reintroduced in my district. And, of course, we have had conservation hatcheries provide a very vital triage role in avoiding extinction for coho and other species.

But I don't hear you saying that hatchery production or artificial propagation should be treated exactly the same as wild fish. You are not saying that, are you?

Mr. BIRMINGHAM. Well, Mr. Huffman——

Mr. HUFFMAN. In all respects, in the full measure of ESA compliance.

Mr. BIRMINGHAM. What I am suggesting through my testimony is that it is appropriate for Congress to make a policy choice.

Mr. HUFFMAN. I read your testimony, and I appreciate that, but you are not suggesting that they should be exactly the same under the ESA, are you?

Mr. BIRMINGHAM. What I am saying is that H.R. 520, from my perspective, makes a lot of sense. You are absolutely correct.

Mr. HUFFMAN. You don't disagree with me, that there is a difference between using hatcheries as a tool versus hatcheries as full compliance, full stop, no need to restore habitat, no need to do anything else.

Mr. BIRMINGHAM. And I have not read H.R. 520 as doing that, Mr. Huffman.

Mr. HUFFMAN. I do read it as doing that. But I just wanted to make sure that you and I were not in disagreement.

I want to ask you about the Klamath, because Mr. McClintock said that the inspiration for this legislation that would treat hatchery production exactly the same as wild fish was his opposition to Klamath Dam removal.

Mr. Birmingham, you and I go way back, more years than I care to count. We have crossed swords occasionally, but my recollection is that you have never opposed Klamath Dam removal, have you?

Mr. BIRMINGHAM. I have never opposed Klamath Dam removal.

Mr. HUFFMAN. In fact, you supported Prop 1 in California, did you not, and it provided $250 million for Klamath Dam removal?

Mr. BIRMINGHAM. Well, as you said, Mr. Huffman, you and I go way back. This water policy expert designation was not something I chose. It was given to me, apparently, by staff.

Mr. HUFFMAN. I just wanted to get that clarified for the record.

Dr. Taylor, if I could, because I am running out of time, we have a bill before us that would pause revising the biological opinion and the designation of critical habitat for the Rice's whale indefinitely, potentially, for many years. Does the Rice's whale have years and years to wait for all of these hoops to be jumped through before it gets protection?

Dr. TAYLOR. Yes, the Rice's whale is critically endangered, according to the IUCN, which means that it is in the emergency room, and the first thing that has to be done is to stop the bleeding. And every measure has to be taken, and no measure has been taken since I started working on this 10 years ago. So, the timing right now is really critical to actually take some actions to stem what is happening with this whale.

And if I might just point out that, for species like this that are so few in number, it is really almost impossible to tell whether they are decreasing or increasing. It is not a fair thing to hold that as a piece of evidence that has to be——

Mr. BENTZ. If you could, wrap up, thank you.

Mr. HUFFMAN. Thank you, Dr. Taylor.

I yield back.

Mr. BENTZ. Thank you.

Mr. LaMalfa, you are recognized for 5 minutes.

Mr. LAMALFA. Thank you, Mr. Chairman. I want to pose a question for Mr. Frazer.

Under the proposed rules, withdrawn under Mr. Newhouse's bill, when the Secretary is designating critical habitat, they will no longer need to be reasonably certain that currently unoccupied habitat will actually meet the needs of a listed species, or that such unoccupied lands or waters contain physical or biological features needed for species conservation and recovery.

Can you describe the new criteria you would use to designate critical land habitat on a parcel of land that doesn't actually

contain these features and that the Secretary isn't reasonably certain will actually contribute to recovery?

Mr. FRAZER. Thank you, Congressman.

Critical habitat is a recovery tool. It is a requirement under the statute for us to designate critical habitat, which are those specific areas that are essential for the conservation or recovery of the species. And the statute has a definition that has two prongs, one dealing with the standards for designating areas that are occupied at the time of listing, and another that refers to areas that were not occupied at the time of listing.

The regulations that we finalized in 2019 added those additional elements that you spoke to for the consideration of identifying areas that were unoccupied at the time of listing as critical habitat. So, our revisions that we have proposed would have our regulations be more closely aligned to statutory language. Our purpose, though, is to identify those areas that are essential for conservation, no more and no less, and to do so on the basis of sound science and following the statutory direction that we have.

Mr. LAMALFA. How is it sound science if it doesn't meet the bar of reasonably certain that this habitat would be actually used by a species?

It sounds like it is a very wide-ranging definition that will take more and more land into a habitat zone that is now less useful for other purposes.

Mr. FRAZER. As I said, our purpose is to identify those specific areas that are essential for the conservation of the species. Our proposed rule talks about first considering areas that are occupied. It is not a hard and fast requirement that we do so and exhaust those circumstances.

But most species that are listed are listed because they have lost habitat, they have declined from their historical range. And in order for them to recover, we need to re-establish them in areas where they previously existed and that were unoccupied at the time of listing. So, to make the critical habitat designation function as we think Congress intended, in some circumstances we need to identify unoccupied areas.

Mr. LAMALFA. Congress intended back in the early 1970s, huh?

Mr. FRAZER. I am sorry, Congressman.

Mr. LAMALFA. Congress intended back in the early 1970s, that what we have today is something Congress intended back in the early 1970s.

Mr. FRAZER. We are working with the statute that was enacted 50 years ago. Yes, sir.

Mr. LAMALFA. I can cite one example in my own district. Elderberry bushes are required to be basically untouched because an elderberry beetle may come along, even when they haven't been seen there in who knows how long. So, that is now critical habitat, and has caused extremely expensive work to have to be done to critical flood control systems in areas I represent, and it has taken many, many years to get that work done because of the idea that an elderberry beetle may come along.

Mr. FRAZER. I can say that critical habitat is a challenging concept to apply. During my tenure in this job, I have worked really hard to try to make sense of this concept.

Mr. LAMALFA. Yes, challenging glosses over what real people have to deal with out there in agriculture and flood control, and water storage, and all that.

Mr. Birmingham, let me give you a moment here on the previous questioning. The idea that because you were supporting Prop 1 in order to build more water storage in California, that means you are also in favor of tearing down the Klamath dams. I supported Prop 1, and I am extremely opposed to the continued destruction of Klamath dams and the other dams that are on the list of my colleague here to tear down so we don't have water storage or electricity generation. Would you care to touch on that?

Mr. BIRMINGHAM. Well, you are absolutely correct in terms of Prop 1 did many things, and people supported it for many reasons. One of the things that it did was to provide funding to remove the dams, but it did provide funding for other water supply projects.

Mr. LAMALFA. $150 million of taxpayer money that could be applied toward a vague dam removal, yes.

Mr. BIRMINGHAM. Yes. But the other point is that H.R. 520 does not say we are going to start ignoring habitat.

Mr. LAMALFA. Right.

Mr. BIRMINGHAM. It doesn't say we are going to start ignoring the other tools identified by Congress to recover species and to protect habitat. What it says is we are going to treat the animals whether they are artificially propagated or naturally propagated, we are going to treat them the same. That is all it does. It doesn't say forget about habitat.

Mr. LAMALFA. Thank you.

Mr. BIRMINGHAM. It doesn't say forget about the other conservation tools.

Mr. LAMALFA. Thank you.

I yield back.

Mr. BENTZ. Thank you. The Chair recognizes Congresswoman Peltola for 5 minutes.

Mrs. PELTOLA. Thank you, Mr. Chairman. There are a whole host of bills here on the agenda. Again, another holistic day, kind of. The first bill that I want to speak to briefly is Representative McClintock's bill, H.R. 520.

As an Alaskan, as someone who grew up commercial fishing for wild Alaska salmon, as an Alaskan who has seen our Congressional Delegation for decades work very hard to kind of have Alaskan wild salmon recognized as wild and in a class of their own, we seem to not be able to have them listed as organic, because we can't prove that they are eating organic food, which just seems like an unfair burden to prove that Alaska wild salmon are organic. They seem like the most organic, healthy thing you can eat.

But also, as somebody who grew up on a river system that has seen multiple millions less return of each species, and seeing the effect that that has on our headwaters, salmon are a cornerstone species and those marine-derived nutrients that make it up hundreds of miles, my river is 500 miles long, or the river I am from, I should say, is about 500 miles long. But you can see the difference in birds, and trees, and every living organism is so reliant on those wild salmon getting up there, and hatchery fish pose a

real threat. Our wild salmon are smaller, and there is a finite carrying capacity.

I know that there is 1950s science out there that says that the ocean has infinite carrying capacity. But as someone who has only lived for 50 years, I have seen it devolve before my own eyes. So, I just want to put a plug in for wild salmon.

And my question is actually for Mr. Beal. And don't worry, it is a softball.

[Laughter.]

Mrs. PELTOLA. I wondered if you could talk, I really appreciated your comments. I appreciated you acknowledging the subsistence harvesters that your council manages for, as well.

One of the things I have seen in Alaska is that subsistence harvesters get no kind of disaster relief when there is a disaster, and we are just fishing to put food on the table. But there is nothing that acknowledges that loss. And then, for our commercial users, and processors, and communities, like you say, it can take years. And I just wonder if you could elaborate on that.

Mr. BEAL. Great, and thank you for the question.

The bill I am talking on today is kind of motherhood and apple pie. Who doesn't want to speed up, accelerate assistance to individuals that qualify for it? And the subsistence fishers, it is difficult to quantify impacts of fishery disasters. And I think that is one of the hurdles that they have to overcome to really understand financial or any other impacts to those individuals of a fisheries disaster.

The fishery disaster approach now is focused on economics. And from the subsistence perspective, that is a shortcoming of the current system. And on the commercial side, it is easy to calculate economic impacts. You have reduced landings, reduced sale prices, whatever it might be. It is really easy to calculate those.

But I think that lack of economic impact or ability to calculate economic impact to subsistence harvesters is one of the roadblocks in providing the support that they do need.

Mrs. PELTOLA. Since we have a little over a minute, could you talk about how challenging it is for commercial fishermen, and processors, and communities to keep going in the gap, in that delta between the disaster and when they are reimbursed or recovered?

Mr. BEAL. Yes, I am happy to. It is kind of like an insurance program on your home. If you had a tragic fire, your house burned down, you can't wait 2 years, 3 years, up to 7 years for insurance money to come through to rebuild your house. And it is a similar situation in fisheries. And that is how long some of these individuals and businesses are having to wait to get assistance to bridge that gap.

And as I mentioned in my testimony, there are multiple loans that are being defaulted upon. There are crews that are being laid off that have to go find other work and multi-generational businesses that are closing. And if fishermen aren't able to work in one area, they move to another area. So, that automatically puts pressure on different stocks and just shifts thing around.

So, having this money quickly available to folks that are qualified to receive it will take that pressure off of other fisheries and prevent future disasters, hopefully.

Mrs. PELTOLA. Thank you, Mr. Beal. And I also appreciated you likening it, or comparing it to farmers. If we can reimburse farmers quickly, we should be able to reimburse fishermen quickly.

Thank you, Mr. Chairman.

Mr. BENTZ. Thank you.

Mr. Graves, you are recognized for 5 minutes.

Mr. GRAVES. Thank you, Mr. Chairman. I appreciate you all being here today.

Mr. Frazer and Mr. Beal, I believe you are the two entities that are here that represent some type of public government entity, and I want to ask you a question. Do you believe that if you are carrying out a novel activity, that you should have some type of public participation or comment, and share some of the background or science with the base that is attempting to justify your actions? Does that sound like an appropriate approach, generally, when you are carrying out government actions?

Mr. Frazer?

Mr. FRAZER. Thank you, Congressman.

I guess it would depend upon the nature of the action. We do innovative things all the time. Individual biologists can take a different approach.

Mr. GRAVES. So, let me see if I can clarify this. I kind of look at this like a yes or no.

If you are doing something that is entirely new, never been done before, and you are carrying out some type of regulatory action generally, and just to let you know, I am not coming after you on this one, I am just trying to get an understanding. Generally, I assume, getting some type of public comment or participation is an appropriate approach, considering you are a government entity. Is that fair? I am not going to say 100 percent of the time. Is that generally fair, and an appropriate approach?

I used to work for a state agency. I benefited from the public comments. They actually pointed out things in many cases that I found helpful, helped us to perfect our proposals. Is that generally your experience, as well?

Mr. FRAZER. If the Fish and Wildlife Service is making a decision or establishing a new practice or a rule that applies to the public generally, we almost always put it out for public notice and comment.

Mr. GRAVES. All right, thank you.

Mr. Beal? Any dissent there?

Mr. BEAL. No, not at all. We are in the same spot. We try to be as open, as transparent, and collect as much public comment as we can on it.

Mr. GRAVES. And it is generally appropriate to kind of share the background in your decision, the scientific evidence, or what have you, in terms of the background. Is that generally fair?

Mr. BEAL. Yes, we have public hearings up and down the whole East Coast on any new ideas.

Mr. GRAVES. Yes, thank you.

Dr. Loureiro, I appreciate you being here today, and I appreciate your testimony.

We have introduced H.R. 6008, which is the RICE's Act, and it pertains to the Rice's whale, which is a species of whale that

apparently has been found in the Gulf of Mexico as a result of a sue-and-settle lawsuit. The Federal Government has imposed restrictions on 11 million acres of the Gulf of Mexico, 6 million acres related to energy production, 11 million acres overall boating restrictions and other things that I would argue actually make things less safe.

This was subjected to no public comment, no scientific rigor, or anything along those lines is my understanding. Is that consistent with your understanding?

Dr. LOUREIRO. Thank you Congressman. To be fair, this was something that was extra-regulatory. This proposed settlement agreement was not reviewed extensively. However, the background literature is still pending peer review. So, the updated model for this current biological opinion is still undergoing peer review in the literature.

Mr. GRAVES. So, the model under which this action may be justified has been developed, but has not been independently peer reviewed, has not been subjected to public comment or participation in the decision. Is that correct?

Dr. LOUREIRO. The model itself is not subject to peer review.

Mr. GRAVES. But the decision, normally you would go through a regulatory action, you would do a proposed regulatory action, notice of proposed rulemaking. You would put it out there, you would get comments, and things along those lines.

Dr. LOUREIRO. Yes. The decision, the regulatory action would be subject to public comment.

Mr. GRAVES. And in this case, as a result of the lawsuit, you effectively have circumvented that step in the process.

So, going back to the model, the model I found curious—or, I guess what I will say extrapolation of data. Now, I used to watch Star Trek every once in a while, and they would do this teleport thing. I always wanted one of those. You all saw those little teleport things, come on, you all never watched Star Trek?

[Laughter.]

Mr. GRAVES. Come on guys, really? All right, all right. I am going to take that as a yes.

But the problem is that I understand, from the acoustic sensors, you have some maybe on the east side of the Gulf, and you don't have clear signals across the entire Gulf showing that the whales actually travel across the entire area. They are apparently, from what I gather from the data, they think that the whales teleport. Does that technology actually exist? For example, the Grand Isle sensor didn't show any hits in regard to the Rice's whale in that area, is that accurate?

Dr. LOUREIRO. Well, I certainly don't think the whales are teleporting, but there is something that we are clearly missing if we have a gap in detections at that Grand Isle site. In 9,000 hours of data, to not record a single detection there is something here that we are missing.

Additionally, we understand that these animals are concentrated to the eastern Gulf of Mexico in the DeSoto area. I completely agree with Dr. Taylor that this species is critically endangered and merits protection. However, those protections belong in the DeSoto Canyon, where the animals live.

Mr. GRAVES. And I want to be clear, Mr. Chairman, I agree with the protection of species and don't want to do anything to harm the species. But I think it is important we protect habitat that is actually habitat.

I am disappointed to learn that the teleporting technology is not alive and well today. I was going to go buy one. But I do appreciate you being here, and I appreciate you giving some more perspective about the significant gap in habitat compared to what the Federal agencies have proffered.

I appreciate that, Mr. Huffman. Great work.

I yield back.

Mr. BENTZ. Thank you. The Chair recognizes Congresswoman Hageman for 5 minutes.

Ms. HAGEMAN. Hello, everyone. Thank you, Mr. Chairman.

Mr. Frazer, in court documents filed in 2021 you contended that, "As the Services explained in their final rules, the 2019 revisions to the section 4 and section 7 regulations did not substantively change how the Fish and Wildlife Service lists species, designated critical habitat, or performs interagency consultations under the ESA. The revisions clarified our existing regulations to make them more consistent with the statutory language, case law, and existing agency practices."

If your statement from these documents is accurate, why is the Service moving forward with revising these rulemakings?

Mr. FRAZER. The Endangered Species Act is clearly a substantive statute, with a lot of people that are interested in understanding exactly how we carry out our responsibilities.

We have found that the 2019 final rules still leave some areas that are open to misunderstanding and confusion, both for our practitioners and the public. Those are the sorts of changes that we are focusing upon in our current proposal.

Ms. HAGEMAN. Mr. Frazer, in 2013, the now U.S. Fish and Wildlife Service Director, Martha Williams, authored an article with other Obama administration officials stating that critical habitat designations "have very little impact" from a "conservation perspective." Do you agree?

Mr. FRAZER. I believe that that paper was written when the Director was in a private capacity, or a non-government capacity.

Ms. HAGEMAN. Do you agree or disagree?

Mr. FRAZER. I find that critical habitat has some value, limited regulatory impact in most circumstances, but it also has information value to identify for the public, what areas are important for recovery.

Ms. HAGEMAN. So, it sounds like you agree with her statement from 2013, whether she wrote it in a private context or not. You agree that there is very limited impact that critical habitat has. Is that correct?

Mr. FRAZER. My job is primarily to implement the decisions that Congress made. They directed us to designate critical habitat.

Ms. HAGEMAN. Right, but I am asking you a question about your observations as an employee of the U.S. Fish and Wildlife Service. What have been your observations?

Mr. FRAZER. Our observations are it rarely makes a major difference in section 7 consultations when we are dealing with an impact to species, as well.

Ms. HAGEMAN. Well, in light of that, wouldn't you agree that designating unsuitable areas as critical habitat only provokes the Supreme Court, alienates landowners, directs our limited resources to things that don't matter, and actually distracts from recovering the species? Wouldn't you agree with that?

Mr. FRAZER. We would never be designating unsuitable areas. We sometimes designate areas that were not occupied at the time of listing, but all the designations are for areas essential for recovery of the species.

Ms. HAGEMAN. Well, coming from Wyoming, I would respectfully disagree.

Mr. Frazier, I would like to ask you a separate question on section 4(d). This rule gets its name from section 4(d) of the ESA, which directs the Secretary of the Interior and, therefore, the U.S. Fish and Wildlife Service, to issue regulations deemed necessary and advisable to provide for the conservation of threatened species.

The common thing we hear from the Service is that tailored 4(d) rules are too expensive to do, but nobody ever says how much they actually cost. Mr. Frazier, how much does it cost for the Service to develop a tailored 4(d) rule?

Mr. FRAZER. That would depend upon the nature of the 4(d) rule and the species that we are talking about.

Ms. HAGEMAN. Can you give me any kind of ranges?

Mr. FRAZER. I don't have that information right on the top of my head. We would be happy to get back with you.

Ms. HAGEMAN. OK, we will request that additional information, and I would like to have that because, again, there is the claim that it is too expensive, but we never get actual numbers. So, I would like to get real, specific numbers.

Mr. Frazer, the proposed rule removes the directive for the Secretary to delist a species if it meets the necessary conditions based on the best available science by replacing the current requirement that the Secretary "shall delist" a species if it meets that criteria and replaces it with "It is appropriate to delist the species if." In other words, you are changing the language and the terminology, and you are taking a directive and turning it into essentially what is mush, in my opinion.

The rationale provided by the Service is that this will remove potential for confusion or concerns that the Service can or will take immediate action to delist. But this change appears to be both anti-science and contrary to the congressional intent of the Endangered Species Act.

If the motivation is truly to provide clarification, why not just state that public notice and comment will be provided prior to delisting?

Mr. FRAZER. That proposed revision to our listing rules is one of those areas where there was confusion, so we are seeking to clarify that through the proposed changes here.

Ms. HAGEMAN. To make it so that, instead of requiring delisting if the recovery criteria have been met, it will be up to the Secretary

of the Interior as to whether they want to go forward with the listing. Is that right?

Mr. FRAZER. Well, the Secretary has the final say, or acting through the Director of the Fish and Wildlife Service.

Ms. HAGEMAN. Sure.

Mr. BENTZ. I am sorry, the gentlelady's time has expired.

Ms. HAGEMAN. Thank you.

Mr. BENTZ. Mr. Duarte, you are recognized for 5 minutes.

Mr. DUARTE. Thank you.

Mr. Birmingham, you were the General Manager of Westlands Water District that is in my district now. I am John Duarte from California. It is good to have you here.

Mr. BIRMINGHAM. Thank you.

Mr. DUARTE. You mentioned in your testimony the socioeconomic impacts of the futile effort to protect and restore the Delta smelt. Could you elaborate on what those social impacts were down in the south part of the San Joaquin Valley, where you worked?

Mr. BIRMINGHAM. Yes, and I want to be completely fair because water supply reductions result from numerous things. They result from drought, they result from regulation, they result from implementation of the Endangered Species Act. But there were times during my career when, even in an average water year or an above average water year, water supplies were significantly reduced because of curtailments imposed on the operations of the Central Valley Project to protect smelt.

And the economics included massive unemployment. Some cities on the west side of the San Joaquin Valley, including some in your district, were experiencing unemployment rates in excess of 40 percent because the people that lived in those communities worked on farms, the farmers did not plant crops, they fallowed their fields because they didn't have water to irrigate.

School districts suffered significant reductions in enrollment because farm workers who couldn't rely on jobs moved to other locations, so the enrollment went down and funding for schools went down.

There was anecdotal information from Sheriff Margaret Mims about the impact of the economic situation on crime. So, there were significant socioeconomic impacts that resulted from water supply because the San Joaquin Valley, your congressional district, depends on having water available to irrigate crops so that the farmers can employ people, so the farmers can buy tractors, can buy new tires, can buy new pickup trucks. And when they have no water, that economic activity goes away.

And if I may, Mr. Duarte, I would like to take just a moment because I mis-stated something earlier, and I don't want to leave the Committee with the impression that I am attempting to mislead it. I said that the snail darter, I thought, was delisted in 1985. That was not correct. My memory is not very good anymore. I believe that it was changed from endangered to threatened in 1983, and was then ultimately delisted in 2021, and I wanted to correct that for the record. So, thank you.

Mr. DUARTE. Sure. So, some of the socioeconomic impacts. Are you aware of any spikes in respiratory illness as we turn the South Valley into a dust bowl?

Mr. BIRMINGHAM. Absolutely. The San Joaquin Valley has soil that contains pathogens that cause what is known as valley fever. And when fields are fallowed, the dust emitted from those fields is inhaled. And actually, there are some very strong correlations between fallowing fields and increases in respiratory illness associated with valley fever.

Mr. DUARTE. And are these advantaged or disadvantaged populations down in that area, in general?

Mr. BIRMINGHAM. They are predominantly disadvantaged communities. As an example, the City of Firebaugh, which I believe is in your congressional district, is 99 percent Hispanic.

Mr. DUARTE. My district is 66 percent Hispanic. It is a Voting Rights Act district. So, I am here to advocate for the farm workers down in my district that are impacted by these socioeconomic and human health issues.

Let's also talk about environmental impacts. And after we are done here in a second I am going to ask you to close and tell me what wonderful things we did for the Delta smelt and perhaps the salmon with our Delta policies and water management policies.

But let's touch really quickly on the groundwater table and the irrigated landscapes that support habitat of other value, and then please close with a description of the status of these targeted species we have sacrificed so much to save.

Mr. BIRMINGHAM. As you are alluding to by your question, as a result of water supply reductions of surface water because of the implementation of the Endangered Species Act, farmers shifted to groundwater. That caused significant declines in groundwater tables. It had impacts for other species like the San Joaquin Valley kit fox, which is another listed species.

So, there are environmental consequences associated with it and, frankly, that is one of the issues that we sometimes run into with respect to the implementation of the Endangered Species Act. It is species-by-species focused. So, we do something to protect one species at the potential cost of another. But as it relates——

Mr. BENTZ. Mr.——I am sorry.

Mr. DUARTE. Let's close. The only Delta smelt we have left are ones we are rearing artificially, right?

Mr. BIRMINGHAM. Pardon me.

Mr. BENTZ. The gentleman's time has expired.

Mr. DUARTE. The only Delta smelt we have left today are artificially reared.

Mr. BENTZ. The gentleman's time has expired. I am sorry, I don't mean to be rude about this, but votes have been called, and I am the last one to ask questions.

Mr. Birmingham, back to you, just so you don't feel left out. Mr. McClintock suggested and asked in his bill that a species in a hatchery be treated the same and perhaps counted if you are looking for an endangered species.

Well, let's assume that there were a million hatchery fish of a certain type and two left in the stream that were truly wild, wild in the sense that in every respect they were identical to those million in the hatchery, but the fact is that they are in this stream, in the river, not in the hatchery. So, they are endangered, as I

understand the discussion of the endangered species. Is that correct, those two are endangered?

Mr. BIRMINGHAM. Yes.

Mr. BENTZ. And the fact that there are another million of them in reality does not matter. Is that correct or not?

Mr. BIRMINGHAM. Generally, yes. And I want to say "generally" because in some species propagated fish, as an example, are counted toward the population. That is a change that resulted because of a judicial decision in Oregon on a listing of coho. But I think if there are two naturally-spawning fish and a million hatchery fish, that is not going to result in the delisting of the species. The species is probably still endangered or threatened for many, many reasons.

The question becomes are we going to just cut off all economic activity because of this listing? And as in the case of the Tellico Dam, Congress decided no, we are not going to just shut off all economic activity.

Mr. BENTZ. Right, I understand that. But what is odd is we would call this the Endangered Species Act, when in point of fact it should be called the Endangered Habitat Act, or the fact that we don't have the fish in the place that we want them, even though there are 1 million to fish, under my hypothetical.

Mr. BIRMINGHAM. Yes. And if those million fish can contribute to the natural propagation, or the propagation of this species—I shouldn't say natural, but the propagation of these species, then ultimately, it may affect it.

Mr. BENTZ. So, forgive me, Mr. Birmingham, I am going to have to shift over to Mr. Wood in the last 2½ minutes that I have left.

Mr. Wood, you had a second idea, then you ran out of time. And I would like you to expand upon it. It had to do with critical habitat. And will it help recover the species? Do you see the link? Tell me about your second concept.

Mr. WOOD. Yes, I agree with what has been said by some of the other witnesses that a lot of species that are listed most are habitat limited, meaning they are not going to recover unless we restore or create new habitat for them.

And the problem with critical habitat designation in that case is that they do nothing to bring that around. Often they will not trigger any additional regulatory protection or consultation, but they will lower the value of land and alienate landowners. And in that way, it can create perverse incentives to destroy the potential to create habitat in those areas.

That is what is so disappointing about the proposal is it provokes conflict that you would have thought after Weyerhaeuser we were moving beyond, and distracts from the focus of what are the other tools that are needed if we are going to restore habitat at the scale that we need if we are going to save species like the dusky gopher frog. There are 135 frogs left in six sites in Mississippi. It would only take one catastrophic event in that area to potentially wipe out that species. Like, if we are going to recover species like this, we have to create more populations, we have to restore additional habitat, but that takes positive incentives.

Mr. BENTZ. Thank you, and I want to thank all of you for being here today. I truly appreciate it, and I want to thank you for your testimony.

The members of the Committee may have some additional questions for witnesses, and we will ask you to respond to these in writing. Under Committee Rule 3, members of the Committee must submit questions to the Subcommittee Clerk by 5 p.m. Eastern on Monday, October 30. The hearing record will be held open for 10 business days for these responses.

If there is no further business, without objection, the Subcommittee stands adjourned.

[Whereupon, at 4:58 p.m., the Subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

Statement for the Record

Bureau of Ocean Energy Management
U.S. Department of the Interior

on H.R. 6008

Introduction

The Bureau of Ocean Energy Management (BOEM, Bureau) within the Department of the Interior (Department) appreciates the opportunity to provide feedback on legislation related to the Endangered Species Act (ESA) consultation and Rice's Whale in the Gulf of Mexico.

BOEM is taking a leading role in transitioning the U.S. to a clean energy future—one that will advance renewable energy, create good-paying jobs, and ensure economic opportunities are accessible to all communities. BOEM is working with Tribal Nations; Federal, state and local governments; underserved communities; ocean users; and key stakeholders to ensure that any future offshore energy development is done safely and responsibly and relies on the best available science and Indigenous knowledge. Together with our partners, we can move forward with offshore energy development in a way that helps create a cleaner, more sustainable energy future for our Nation.

The ESA and resulting consultations are fundamental for preventing the extinction and promoting the recovery of imperiled species, and conserving the habitats upon which they depend.

The Bureau strongly supports safe and responsible domestic energy production that relies on the best available science. Accordingly, the Bureau does not support the goals of H.R. 6008 to prevent enforcement of the voluntary recommendations in the Notice to Lessees that were provided as precautionary measures to protect the Rice's Whale in the Gulf of Mexico. We appreciate the Subcommittee's interest in this topic and welcome future opportunities to work together on these critical issues.

Background

On October 25, 2022, BOEM, along with the Bureau of Safety and Environmental Enforcement (BSEE), formally requested reinitiation of consultation with National Ocean and Atmospheric Administration (NOAA) Fisheries on the 2020 Biological Opinion on the federally Regulated Oil and Gas Program Activities in the Gulf of Mexico (BiOp), pursuant to Section 7 of the ESA.

The reasons for requesting to reinitiate the consultation included: (1) reevaluation of the oil spill risk analysis in the BiOp in response to a new oil spill risk analysis that was performed by BOEM, and (2) incorporation of conditions of approval developed with NOAA Fisheries that are related to impact pile driving for Outer Continental Shelf (OCS) oil and gas activities, and to potential transit of OCS oil and gas activity vessels through the core Rice's Whale Area that NOAA Fisheries identified in the 2020 BiOp reasonable and prudent alternative. The reinitiation request also stated that the Bureaus may seek to conference on critical habitat for the Rice's Whale if it is proposed during the consultation. Thereafter, NOAA Fisheries published a proposed critical habitat designation for Rice's Whale on July 24, 2023, which includes all marine waters between the 100-meter (m) and 400-m

isobaths in the Gulf of Mexico from the U.S. Exclusive Economic Zone boundary off of Texas east to the boundary between the South Atlantic Fishery Management Council and the Gulf of Mexico Fishery Management Council.

Additionally, prior to and during the reinitiated consultation process, new information became available about the occurrence of Rice's Whales in the Gulf of Mexico, such as evidence that Rice's Whales may occur in the Expanded Rice's Whale Area (an area generally defined as between the 100-m and 400-m isobaths in the Gulf of Mexico eastward from the Texas-Mexico boundary and west of the core Rice's Whale Area identified in the 2020 BiOp reasonable and prudent alternative). The reinitiated consultation is ongoing.

Notice to Lessees and Operators

Given this new information regarding the Rice's Whale's range, the fact that the species is one of the most endangered whales in the world (51 or fewer mature individuals), and the ongoing reinitiated consultation, BOEM issued a Notice to Lessees (NTL) on August 21, 2023, that recommended that lessees and operators in the Gulf of Mexico implement certain voluntary avoidance and mitigation measures in the Expanded Rice's Whale Area, until such time as a new or amended BiOp is issued by NOAA Fisheries and any measures identified by them can be implemented. These recommendations apply to the area comprising the northern Gulf of Mexico OCS between the 100-m and 400-m isobaths. This delineation is based on recent third-party scientific information indicating that Rice's Whales may occur in portions of this area. Because the possibility of incidental take of Rice's Whales in the Expanded Rice's Whale Area cannot be dismissed at this time, these additional voluntary precautions are warranted.

The recommended voluntary measures within this area include:

- training visual observers to monitor the vessel for strike avoidance,
- documenting and retaining records for three years on details of transit,
- having all vessels engaged in oil and gas activities, regardless of size, maintain 10-knots or less and avoiding transit through the area after dusk and before dawn, as practicable and consistent with safe operations,
- maintaining a minimum vessel distance of 500-m from Rice's Whales, and
- using an automatic identification system onboard all vessels 65 feet or greater that are engaged in oil and gas activity.

The recommendations do not apply when compliance would place the safety of the vessel or crew, or the safety of life at sea, in doubt. Implementing precautionary measures in the interim, while consultation is ongoing, furthers the goals of protecting marine species and ensuring safe and responsible energy development.

Analysis

H.R. 6008 would prohibit enforcement of BOEM's August 2023 NTL until a new BiOp is complete according to certain specifications. BOEM appreciates the Subcommittee's interest in the ESA and in the Bureau's efforts to support domestic energy production that relies on the best available science. The Bureau does not support the goals of the bill to prevent the precautionary measures that were recommended to protect the Rice's Whale in the Gulf of Mexico. We believe that the recommended guidance will help protect Rice's Whale while ensuring we meet the energy needs of the Nation. BOEM defers to NOAA on any relevant Marine Mammal Protection Act and Endangered Species Act related matters.

Statement for the Record

National Marine Fisheries Service
National Oceanic and Atmospheric Administration
U.S. Department of Commerce

on H.R. 520, H.R. 5103, H.R. 5504, H.R. 2990, and H.R. 6008

Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee, thank you for the opportunity to submit this written statement. The National Oceanic and Atmospheric Administration (NOAA) is responsible for the stewardship of the nation's living marine resources and their habitat. NOAA Fisheries provides vital services for the nation: sustainable and productive fisheries, safe sources of seafood, the recovery and conservation of protected species, and healthy ecosystems—all backed by sound science and an ecosystem-based approach to management. The resilience of our marine ecosystems and coastal communities depends on healthy marine species, including protected species such as whales, sea turtles, salmon, and corals.

H.R. 5504 and H.R. 6008

NOAA Fisheries is responsible for the conservation and recovery of more than 160 endangered and threatened marine and anadromous species under the Endangered Species Act (ESA). The goal of the ESA is to conserve and recover these species and the ecosystems upon which they depend. To implement the ESA, we rely on the best scientific and commercial data available. We work with international, Federal, Tribal, state, and local agencies, as well as nongovernmental organizations and private citizens. NOAA Fisheries and the U.S. Fish and Wildlife Service (U.S. FWS) share responsibility for implementing the ESA. NOAA Fisheries is responsible for most marine and anadromous species. U.S. FWS is responsible for terrestrial and freshwater species. The two agencies share jurisdiction for, and work cooperatively to recover, several species, such as sea turtles, Gulf sturgeon, and Atlantic salmon.

NOAA Fisheries partners with Federal agencies, states, and Federally recognized Tribes to advise and collaborate on activities that might impact endangered and threatened species, marine mammals, and important marine habitats. This work includes:

- Consulting with Federal agencies whose work may affect important fish habitats that are necessary for the spawning, breeding, feeding, and/or growth of healthy fish populations, and working to mitigate impacts.
- Consulting with Federal agencies to ensure that their activities are not likely to jeopardize the continued existence of endangered and threatened species or adversely modify or destroy their critical habitats.
- Working with Tribal governments on marine mammal management, conservation, and recovery, including co-management of subsistence use by Alaska Natives.
- Working with Federal agencies, states, and Tribal governments on the development of fishery management plans.
- Working with Federal agencies, states, and Tribal governments on hatchery activities and the development of hatchery and genetic management plans.
- Working with Federal agencies, states, and Tribal governments on scientific research permits.

Under Section 7(a)(1) of the ESA, Federal agencies are directed to implement programs for the conservation of threatened and endangered species. We assist these agencies with the development of conservation programs for marine species, and we work with Federal agencies, like the U.S. Army Corps of Engineers and the U.S. Forest Service, on training and opportunities to implement proactive conservation actions that will benefit ESA-listed species and their habitats. Under Section 7(a)(2), Federal agencies must consult with NOAA Fisheries when any project or action they take might affect an ESA-listed marine or anadromous species or designated critical habitat to ensure their activities are not likely to jeopardize the continued existence of endangered or threatened species or adversely modify or destroy their critical habitats. The consultation process can vary depending on the complexity of the project or action. Where possible, NMFS has used programmatic consultations to streamline the regulatory process by creating a framework under which numerous individual actions and permits can be addressed more efficiently.

H.R. 5504 would require NOAA Fisheries to withdraw proposed rules revising regulations under Section 7 of the ESA on Interagency Cooperation (88 Fed. Reg. 40753) and Section 4 of the ESA on Listing Endangered and Threatened Species and Designating Critical Habitat (88 Fed. Reg. 40764). H.R. 5504 would prohibit NOAA Fisheries from taking any action to finalize, implement, or enforce these proposed rules.

These proposed rules improve NOAA Fisheries' ability to fulfill its responsibilities under the Endangered Species Act to protect and recover listed species. They clarify standards for listing, delisting, and reclassifying species, and improve the interagency consultation process. NOAA Fisheries opposes H.R. 5504, because it would overturn these science-based rulemakings that follow the requirements of the law, and thereby undermine the ESA.

H.R. 520

NOAA has not yet had a chance to adequately review H.R. 520 or 6008, but we look forward to working with the Committee on this legislation.

H.R. 5103—Fishery Improvement to Streamline untimely regulatory Hurdles post Emergency Situation Act or the "FISHES" Act

In addition, U.S. marine fisheries are the largest in the world—covering 4.4 million square miles of ocean. We manage fisheries to support our domestic seafood supply, protect ecosystem health and sustainability, create jobs and support economic and social benefits, and provide fishing opportunities for all types of fishermen. The Magnuson-Stevens Fishery Conservation and Management Act (MSA) is the primary law governing marine fisheries management in U.S. federal waters. Key objectives of the MSA are to prevent overfishing, rebuild overfished stocks, increase long-term economic and social benefits, and ensure a safe and sustainable supply of seafood.

Fishery resource disaster assistance is administered by the Department of Commerce through NOAA Fisheries. A fishery resource disaster is an unexpected, large decrease in fish stock biomass or other change that results in significant loss of access to the fishery resource, which may include loss of fishing vessels and gear, for a substantial period of time, and results in significant revenue loss or negative subsistence impact due to an allowable cause. The MSA, as amended by the Consolidated Appropriations Act of 2023, Title II, the Fishery Resource Disasters Improvement Act (FReDI), provides the authority and requirements for fishery resource disaster assistance. A request for a fishery disaster determination is generally made by the Governor of an affected State, an official resolution of an Indian Tribe, or an elected or politically appointed executive representative of an affected fishing community (e.g., mayor, official Tribal representative, city manager, county executive, etc.). The Secretary of Commerce (Secretary) may also initiate a review at their own discretion. The Secretary determines whether the circumstances are consistent with the MSA and warrant a fishery resource disaster determination. If the Secretary determines that a fishery resource disaster has occurred, and there are congressionally appropriated funds available, then the Secretary may allocate such funds for disaster assistance. Those funds are administered by the Department of Commerce.

NOAA appreciates Congress' desire to further expedite the fishery disaster process through H.R. 5103. With the passage of the FReDI, we are already implementing several process improvements to the program that we anticipate will result in providing funds to affected communities more expeditiously once we receive fishery disaster appropriations. We are currently working through the first few disaster requests under the new legislation and are not yet able to identify where or if further process improvements may be needed.

H.R. 2990—National Oceanic and Atmospheric Administration Sexual Harassment and Assault Prevention Improvements Act

NOAA's critical work is only possible through the efforts of dedicated people who are committed to the mission of the agency, NOAA's most valuable resource. Therefore, the prevention of and response to sexual assault and harassment continue to be a high priority within NOAA. The provisions introduced in H.R. 2990, the NOAA Sexual Harassment and Assault Prevention Improvements Act of 2023 align with NOAA's on-going efforts to ensure adequate support is available for survivors while fostering an environment of safety to encourage reporting, including by adding a restricted reporting option so that survivors can access assistance while preserving privacy and confidentiality.

Expanding the scope of sexual harassment and sexual assault reporting to Congress to include equal employment opportunity, a synopsis of sexual harassment

cases, disciplinary action taken in each case, number of requests for change of work location and number of requests denied, and number of employees or contractors referred to the U.S. Coast Guard will result in greater transparency, trend analysis, and risk mitigation. NOAA whole-heartedly supports the provisions of The NOAA Sexual Harassment and Assault Prevention Improvements Act of 2023 and look forward to sharing our progress with accomplishing our prevention and response initiatives to foster an environment free of sexual assault and sexual harassment.

Conclusion

We appreciate the opportunity to review and work with you on legislation. The bills being considered at this hearing address many important issues. We have not been able to review the bills in detail but would be happy to work with the committee on them.

NOAA is proud to continue to lead the world in conducting ocean science, serving the nation's coastal communities and economies, and ensuring responsible stewardship of our ocean and coastal resources. We wish to work with you to improve conservation and management of our nation's marine resources. Thank you, Members of the Subcommittee and your staff for your work to support NOAA's mission.

Statement for the Record

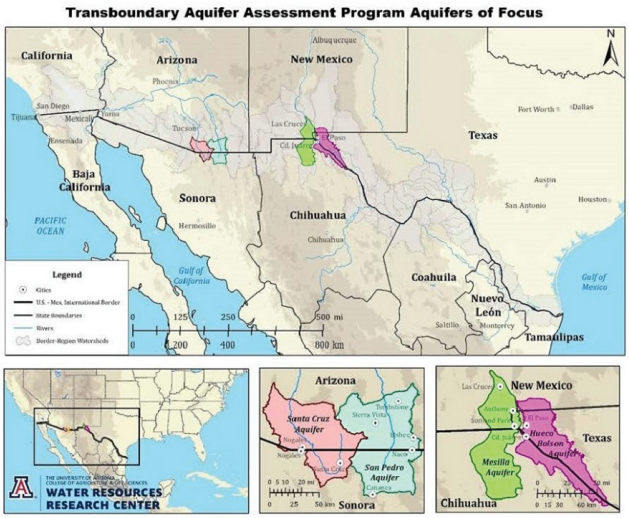
U.S. Geological Survey
Department of the Interior

on H.R. 5874

Chairman Bentz and Ranking Member Huffman, thank you for this opportunity to provide the views of the U.S. Geological Survey (USGS) on H.R. 5874, the Transboundary Aquifer Assessment Program Act, or TAAP Act. The TAAP was first authorized by Congress in 2006 and is implemented by the International Boundary and Water Commission—Mexico Section; the USGS and its Water Resources Research Institutes located at the University of Arizona, New Mexico State University, and Texas A&M; and the Comisión Nacional del Agua or CONAGUA.

Background

In the original authorization, certain aquifers which underly the U.S.-Mexico border are designated as priorities for the TAAP, namely the Hueco Bolson and the Mesilla aquifers underlying New Mexico, Texas, and Chihuahua, and the Santa Cruz River Valley and San Pedro aquifers underlying Arizona and Sonora. In the Mesilla basin, the USGS and its partners are conducting field studies to establish the aquifer's physical characteristics, geochemistry, and recharge along the Rio Grande. This work will support a binational technical working group that is discussing a framework for a model of the basin. Such a model has been developed for the Santa Cruz River Valley and San Pedro basins, and discussions are underway to update the existing model for the Hueco Bolson basin.



Maps of current TAAP priority aquifers, courtesy Univ. of Arizona.

In the time since the original authorization of the TAAP, additional water-use and development along the U.S.-Mexico border in Arizona and Sonora has highlighted the value of collaborative aquifer investigations. For example, current cooperation on the ecologically and culturally sensitive Quitobaquito Hills and La Abra Plain aquifers is identifying areas of needed investigation. Discussions among the TAAP partners suggest support for designating them as priorities.

H.R. 5874, TAAP Act

Under the TAAP, the Secretary currently has the authority to designate additional aquifers under New Mexico and Texas as priorities. Sec. 2 of H.R. 5874 extends this authority to Arizona, with the exception of the Yuma basin. This section also extends the sunset for the TAAP to 2035.

Reauthorization of the TAAP is important to the ongoing work of the USGS and its partners. Given discussions with those partners, the USGS supports the expansion of authority to designate priority TAAP aquifers in Arizona.

Submissions for the Record by Rep. Bentz

PET ADVOCACY NETWORK
Alexandria, Virginia

October 25, 2023

House Natural Resources Committee
Water, Wildlife & Fisheries Subcommittee
1324 Longworth House Office Building
Washington, DC 20515

Re: Support for H.R. 5504

To Whom it May Concern:

The Pet Advocacy Network appreciates the opportunity to offer our views regarding H.R. 5504, a bill that would require the Director of the United States Fish and Wild life Service and the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration to withdraw proposed rules relating to the Endangered Species Act of 1973. As the country's largest pet trade association, representing the interests of all segments of the pet industry throughout the United States, the Pet Advocacy Network counts among its members national associations, organizations, corporations and individuals involved in the commercial pet trade. More specifically, the Pet Advocacy Network represents the interests of, pet stores, suppliers, distributors, pet supply manufacturers, retailers and pet owners throughout the United States.

Let me start by saying that the Pet Advocacy Network is committed to conservation. We have for many years provided a well-respected animal care certification program that is widely utilized by not only persons in the commercial pet trade but shelters, humane societies and institutes of higher education as well. Our association has long been recognized as the voice for a responsible pet trade, and we routinely advocate legislative and regulatory proposals establishing governmental mandates where appropriate to advance the public interest and welfare of pets and the environment. The Pet Advocacy Network works closely with US Department of Agriculture, Department of the Interior and CITES to ensure effective enforcement of the Federal Animal Welfare Act, management of threatened or endangered species and control of invasive species, and have since its inception. We regularly work with federal and state agencies as well as local governments to advance animal welfare and environmental interests.

On June 22, 2023, the U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce published Docket FWS-HQ-ES-2021-0107, a proposed rule to amend 50 CFR 424.11(b) of the Endangered Species Act of 1973 and Docket FWS-HQ-ES-2023-0018, a proposed rule to amend sections 4 and 9 of the Endangered Species Act.

Docket FWS-HQ-ES–2021–0 107 proposes to eliminate the requirement that an agency consider "possible economic or other impacts". While this may sound like a sensible approach in protecting threatened or endangered species, it will actually result in agencies basing their decisions on incomplete data creating a misleading picture of a proposed species' status. As evidenced by the recent proposal to ban international trade in the Banggai cardinalfish (Proposed rule NOAA-NMFS-2023-0099), NOAA's 5-year review not only downplayed international analysis and management plans (which the United States helped to fund) but completely ignored the fact that virtually all specimens being imported into the U.S. come from aquaculture facilities. The fact that the importation of the Banggai cardinalfish actually aids in the recovery of the wild populations would not even have been noted by NOAA had they not been required to conduct an economic analysis and speak to the pet trade. While economic impacts should certainly not be the sole basis for a decision on whether to list a species as threatened or endangered it must be considered in order to make an informed decision.

Docket FWS-HQ-ES-2023-0018 proposes to eliminate the requirement that the U.S. Fish and Wildlife Service (USFWS) write a 4(d) rule defining the restrictions in the trade of threatened species and rather treat them all as endangered. This change would create a situation in which all threatened species would become de facto endangered species. Such a change would be inappropriate given the much lower standard for listing a species as threatened than endangered and needlessly jeopardizes businesses and livelihoods.

The Pet Advocacy Network requests that you advance HR5504 and protect species at risk, jobs and Americans' access to companion animals.

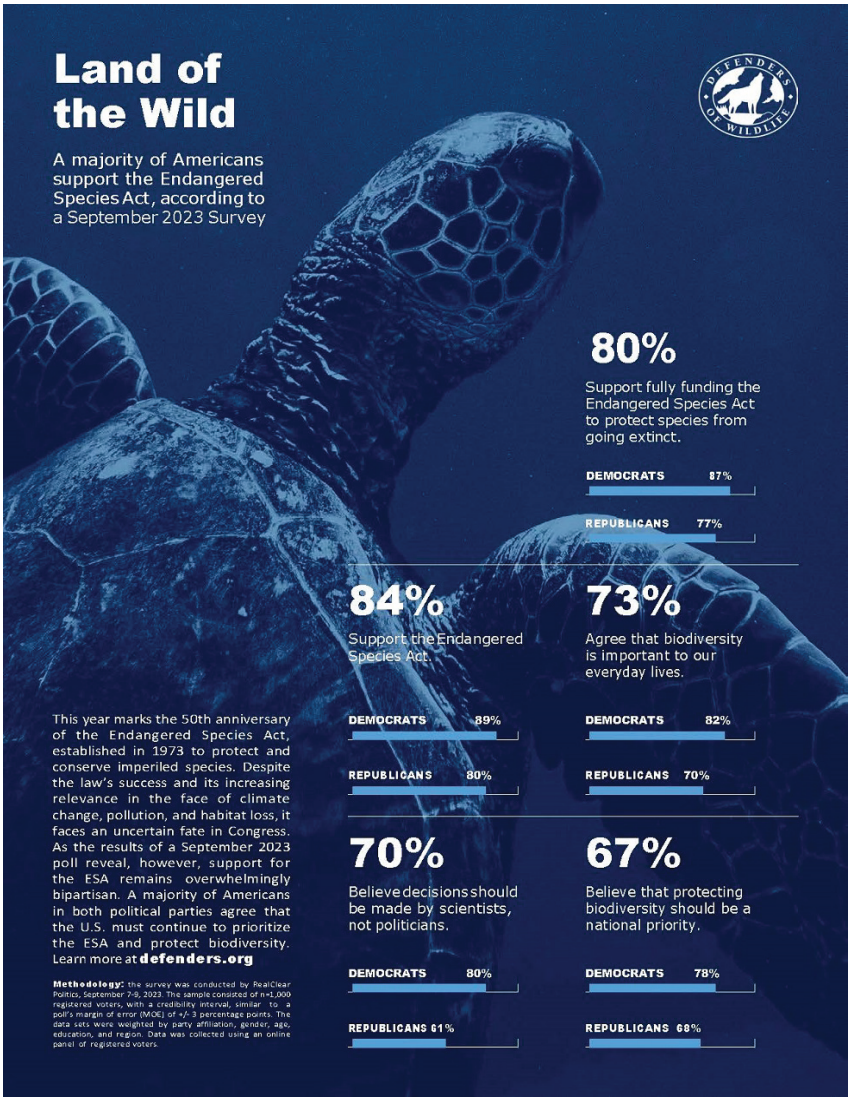
Thank you for your consideration of this request.

Sincerely,

ROBERT LIKINS,
Executive Vice President

Submissions for the Record by Rep. Huffman

One-pager from the Defenders of Wildlife on the Endangered Species Act



October 24, 2023

Hon. Cliff Bentz, Chairman
Hon. Jared Huffman, Ranking Member
House Natural Resources Committee
Water, Wildlife & Fisheries Subcommittee
1324 Longworth House Office Building
Washington, DC 20515

Honorable Chair Bentz and Ranking Member Huffman,

On behalf of our millions of members and supporters, we are writing in strong opposition to Rep. Graves' harmful Gulf of Mexico Rice's whale bill H.R. 6008. This bill prohibits and delays necessary protections for the critically endangered whale in favor of the oil and gas industry, which, coincidentally, is largely responsible for the species' decline. It does so by undermining our bedrock environmental laws, ignoring the science, and giving industry special influence over agency decision-making. With only about 50 whales remaining, we cannot let oil and gas interests, armed with misinformation, obstruct conservation of one of America's most endangered whales.

The magnificent Gulf of Mexico whale (also known as Rice's whale) is the only great whale species resident year-round in U.S. waters. These whales are also acutely vulnerable to vessel strike, as they spend the majority of their time near the ocean surface—about 90% of the time at night, when they come to the surface to rest, and 70% of their time overall. Their natural behavior places them within the draft of large commercial vessels. In a 2020 Biological Opinion, NOAA found that mortalities from vessel strikes are likely to exceed—by more than ten times—what the species can sustain.

The oil and gas industry is a major contributor to vessel strike risk, contrary to recent statements by the American Petroleum Institute and other trade associations. NMFS found that the oil and gas industry represents about one-third of the total risk from vessels transiting through the whale's habitat. An update by a former Duke University researcher using the latest data on Rice's whale distribution shows that industry vessels are responsible for an even larger share: about 40% of the total risk. Furthermore, NMFS estimates that the catastrophic BP Deepwater Horizon oil spill resulted in the loss of 22% of the species' population. And the industry's high-energy seismic blasting is so pervasive that NMFS biologists concluded, in the agency's most recent Status Review, that it is likely to "seriously degrade" the population by compromising the whales' ability to feed and reproduce.

Despite knowing the serious threat the oil and gas industry poses to the whale's survival, this bill aims to undermine measures to protect the whale. Specifically, the bill:

- *Interferes with our foundational environmental laws*. The bill would legislate that compliance with the 2020 Biological Opinion is sufficient to comply with the Endangered Species Act, the Marine Mammal Protection Act, and all other federal environmental laws until NMFS publishes a new biological opinion.
- *Prohibits BOEM from taking measures to protect the whale even as it opens huge expanses of the Gulf to new oil and gas leasing*. The bill would prohibit BOEM from acting on the best available and latest science and from implementing any additional protections for Rice's whales until a new biological opinion is complete.
- *Forces delay in protecting one of our most endangered species*. The bill would delay the development and release of a new Biological Opinion by forcing NMFS to pause its existing work and to await the release of unnecessary reports.
- *Intervenes in ongoing litigation*. The bill would undermine a settlement agreement that requires BOEM to reevaluate protections for Rice's whale, in light of new information about oil spill risk and a new, five-year NOAA study of Rice's whale habitat.
- *Provides the oil and gas industry with unprecedented special influence over the agency's decision-making*. The bill would require NMFS to have special private meetings with industry about any proposed measures in a new Biological Opinion that may be required to protect Rice's whales. This will inevitably allow industry to influence what is reasonable or prudent in their favor.

The 50 remaining Gulf of Mexico Rice's whales cannot afford to pay the price of this gift to the oil industry extending business-as-usual in the Gulf of Mexico. If this whale goes extinct, there will be no other country to blame. As a group of one hundred concerned marine scientists stated in an open letter last year, "[u]nless significant conservation actions are taken, the United States is likely to cause the first anthropogenic extinction of a great whale species." We cannot let ourselves be the first generation of Americans to let a great whale go extinct, and all because of greed from oil and gas companies.

It's not too late to turn the ship around. Join us in opposing this harmful bill and standing up for our amazing Gulf of Mexico Rice's whale.

Sincerely,

Animal Legal Defense Fund

Animal Welfare Institute

Buffalo Field Campaign

Center for Biological Diversity

Clearwater Marine Aquarium Research Institute

Coastal Plains Institute

Defenders of Wildlife

Earthjustice

Endangered Species Coalition

Environmental Investigation Agency

Environmental Protection Information Center

FOUR PAWS USA

Friends of Blackwater, Inc.

Healthy Gulf

International Marine Mammal Project of Earth Island Institute

Kettle Range Conservation Group

League of Conservation Voters

Los Angeles Audubon Society

Natural Resources Defense Council

NY4WHALES

NYC Plover Project

Ocean Alliance

Oceana

Oceanic Preservation Society

Predator Defense

Resource Renewal Institute

Sanctuary Education Advisory Specialists

Sierra Club

Southern Environmental Law Center

The #RelistWolves Campaign

The Urban Wildlands Group

Voices of Wildlife in NH

Western Watersheds Project

Wild Fish Conservancy

World Wildlife Fund

Wyoming Untrapped

October 24, 2023

House Committee on Natural Resources
1324 Longworth House Office Building
Washington, DC 20515

Dear Representatives:

We write to express our opposition to H.R. 5504, To require the Director of the United States Fish and Wildlife Service and the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration to withdraw proposed rules relating to the Endangered Species Act of 1973, and for other purposes.

Over the past five decades, the ESA has been remarkably successful: the vast majority of species protected under the Act have not gone extinct. At the same time, we are facing a global biodiversity crisis. Human activity has put over a third of the plants and animals in the U.S. at risk of extinction and biodiversity loss is occurring at an unprecedented pace. The biodiversity crisis means fewer pollinators for agriculture, depleted fisheries, and disappearing places like old-growth forests and wetlands that provide a long-term, low-cost source of clean air, water and carbon storage. The Endangered Species Act is the best tool we have to stop extinctions and fight the biodiversity crisis, and it is vital that we fully implement it.

In June of this year the Fish and Wildlife Service and National Marine Fisheries Service proposed three draft regulations that respond to President Biden's direction that the agencies review three 2019 regulations that weakened implementation of the ESA. Harmful provisions in the 2019 rules included allowing for economic considerations in ESA listing decisions, contrary to statute, and removing common-sense, default protections for threatened species upon listing by the Fish and Wildlife Service.

This legislation attempts to force the Services to leave the 2019 rules in place and would leave us with weaker ESA regulations at a time when we must be doing everything in our power to fight the biodiversity crisis and recover species from the brink of extinction. This bill aims to take decisionmaking authority away from federal biologists and experts, and to prevent them from taking critical steps to strengthen ESA implementation. This bill is also a distraction from the real challenges that we face in fully realizing the potential of the Endangered Species Act, including a lack of the necessary funding to support listing and recovery of imperiled species.

We urge you to oppose this harmful bill.

Signed,

American Bird Conservancy

American Legal Defense Fund

American Welfare Institute

Buffalo Field Campaign

Center for Biological Diversity

Coastal Plains Institute

Defenders of Wildlife

Earthjustice

Endangered Species Coalition

Environmental Investigation Agency

Environmental Protection Information Center-EPIC

Natural Resources Defense Council

New Hampshire Audubon

North Central Washington Audubon Society

NY4WHALES

NYC Plover Project

Ocean Alliance

Ocean Conservation Research

Oceana

Oceanic Preservation Society

Resource Renewal Institute

Sanctuary Education Advisory Specialists SEAS

FOUR PAWS USA

Friends of Blackwater, Inc.

Friends of the Wisconsin Wolf

Great Lakes Wildlife Alliance

Humane Society Legislative Fund

IFAW—International Fund for Animal Welfare

International Marine Mammal Project of Earth Island Institute

Kalmiopsis Audubon Society

Kettle Range Conservation Group

League of Conservation Voters

Los Angeles Audubon Society

National Parks Conservation Association

Save the Manatee Club

Sierra Club

Southern Environmental Law Center

The Conservation Angler

The Humane Society of the United States

The Urban Wildlands Group

Turtle Island Restoration Network

Voices of Wildlife in NH

Western Watersheds Project

Wild Fish Conservancy

World Wildlife Fund

Wyoming Untrapped

October 23, 2023

Re: **PLEASE OPPOSE ANTI-ESA BILL H.R. 520**

Dear Representative:

On behalf of our organizations and our millions of members and supporters, we urge you to oppose H.R. 520, "To amend the Endangered Species Act of 1973 to provide that artificially propagated animals shall be treated the same under that Act as naturally propagated animals, and for other purposes," introduced by Rep. Tom McClintock R-CA. The bill will be included in a hearing expected to be held by the House Natural Resources Subcommittee on Water, Wildlife and Fisheries on October 25, 2023.

H.R. 520 would undermine the central purpose of the Endangered Species Act (ESA)—the conservation of the ecosystems upon which endangered species and threatened species depend, 16 U.S.C. § 1531(b). H.R. 520 accomplishes this by prohibiting the Secretary from distinguishing between naturally propagated animals and artificially propagated animals in making determinations under the Act. The bill adds a new Section 14 to the ESA that directs the Secretary to authorize the use of artificial propagation of animals of a species for purposes of any mitigation required under the Act with respect to such species.

The ESA is America's most effective law for protecting wildlife in danger of extinction. Nearly all species listed under the ESA have been saved from disappearing forever and hundreds are on the path to recovery. Species saved from extinction by the ESA include America's symbol—the bald eagle—as well as the peregrine falcon, the brown pelican, the American alligator, the humpback whale, and the whooping crane. Scientists have warned that one million species are facing extinction in the coming years. At a time when the planet is experiencing a biodiversity crisis of epic proportions, Congress should not be considering legislation that guts our best tool for addressing this rapidly worsening crisis.

Controlled propagation is an essential tool in the conservation of imperiled species, expressly authorized by Section 3(3) of the ESA, 16 U.S.C. § 1532(3). Propagation is used by the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS) and other conservation agencies to maintain genetic diversity in small, isolated populations, to permit scientific research, to supplement wild populations and to recover depleted populations in secure settings before reintroducing them to the wild. But as the FWS and NMFS noted in adopting a formal policy governing the use of controlled propagation, 65 FR 56916 (September 20, 2010), the central purpose of the ESA is to conserve the ecosystems on which endangered and threatened species depend, and "controlled propagation is not a substitute for addressing factors responsible for an endangered or threatened species' decline." The agencies declared that their "first priority" is "to recover wild populations in their natural habitat wherever possible, without resorting to the use of controlled propagation." *Id*. Moreover, as the FWS/NMFS policy makes clear, the use of propagation must be carefully controlled to avoid transmission of disease or genetic release into wild populations that may harm their survival.

H.R. 520 would force FWS and NMFS to abandon their carefully controlled approach to propagation as a conservation tool, forbidding the Secretary from making any distinction between artificial propagation and natural propagation and requiring approval of artificial propagation whenever mitigation is required under the ESA. Even more alarming, the sweeping language of H.R. 520 would force the Secretary to treat artificially propagated animals as if they were wild in making listing determinations and in determining when species have recovered. Sufficient numbers of fish in a hatchery or of animals in a zoo could, under this bill, preclude listing such species or force their delisting even when the species is still headed for extinction in the wild. The bill would thus destroy the central purpose of the ESA—conserving the habitats on which endangered and threatened species depend so that species can thrive in the wild.

Again, we urge you to oppose this damaging legislation. Thank you for your attention.

Sincerely,

American Bird Conservancy

American Humane

Amigos for Monarchs

Amphibian and Reptile Conservancy

Animal Legal Defense Fund

Animal Welfare Institute

Animal Wellness Action

Apex Protection Project

Azul

Bat Conservation International

Between the Waters

Binder Park Zoo

Born Free USA

Buffalo Field Campaign

CalWild

Cascadia Wildlands

Center for a Humane Economy

Center for Biological Diversity

Central Sierra Environmental Resource Center

Christian Council of Delmarva

Clean Water Action

Coalition on the Environment and Jewish Life

Conservatives for Responsible Stewardship

Corazon Latino

Council for the Bighorn Range

National Parks Conservation Association

National Wildlife Refuge Association

Native Fish Coalition

Natural Resources Defense Council

New Hampshire Audubon

North American Climate, Conservation and Environment (NACCE)

North Cascades Conservation Council

North Central Washington Audubon Society

Northcoast Environmental Center

Northeastern Minnesotans for Wilderness

Northern California Council, Fly Fishers International

Northern Front Range Broadband, Great Old Broads for Wilderness

Northwest Center for Alternatives to Pesticides

NY4WHALES

Ocean Alliance

Oceana

Oceanic Preservation Society

OneNature

Oregon Natural Desert Association

Partnership for Policy Integrity

People & Pollinators Action Network

Pilchuck Audubon Society

Plastic Pollution Coalition

Predator Defense

Primate Conservation Inc

Defenders of Wildlife

ECODiversity

Endangered Habitats League

Endangered Species Coalition

Environmental Defenders of McHenry County

Environmental Protection Information Center-EPIC

Farmer Frog

Fly Fishers International

FOUR PAWS USA

Friends of Blackwater, Inc.

Friends of Merrymeeting Bay

Friends of the Earth

Friends of the Inyo

Friends of the Wisconsin Wolf

Gaviota Coast Conservancy

Grand Canyon Wolf Recovery Project

Great Lakes Wildlife Alliance

Great Old Broads for Wilderness

GreenLatinos

Greenpeace USA

Harris Center for Conservation Education

Heartwood

Howling For Wolves

Humane Action Pennsylvania

Humane Action Pittsburgh

IFAW—International Fund for Animal Welfare

Information Network for Responsible Mining

International Marine Mammal Project of Earth Island Institute

Resource Renewal Institute

Rocky Mountain Wild

SAFE Alternatives for our Forest Environment

San Diego Zoo Wildlife Alliance

San Luis Valley Ecosystem Council

Santa Barbara Zoo

Save Our Sky Blue Waters

Save Our Wild Salmon Coalition

Save the Manatee Club

Shift Our Ways Collective

Sierra Club

Sierra Foothills Audubon Society

Sierra Forest Legacy

Southern Environmental Law Center

The #RelistWolves Campaign

The Conservation Angler

The Cougar Fund

The Urban Wildlands Group

The Vocal Seniority

The Wei LLC

Unite the Parks

Voices of Wildlife in New Hampshire

Western Nebraska Resources Council

Western Watersheds Project

Western Wildlife Outreach

WildEarth Guardians

Wilderness Watch

Wilderness Workshop

IWLA Harry Enstrom Chapter

Kentucky Heartwood

Kettle Range Conservation Group

Klamath Forest Alliance

Latino Outdoors

League of Conservation Voters

Los Angeles Audubon Society

Los Padres ForestWatch

Maine Audubon

Wildlands Network

Winter Wildlands Alliance

Wolf Conservation Center

World Animal Protection

World Wildlife Fund

Wyoming Untrapped

Wyoming Wildlife Advocates

Xerces Society for Invertebrate Conservation

Submissions for the Record by Rep. Donalds

ATLANTIC STATES MARINE FISHERIES COMMISSION
Arlington, Virginia

August 3, 2023

Hon. Bruce Westerman, Chairman
Hon. Raúl Grijalva, Ranking Member
House Natural Resources Committee
1324 Longworth House Office Building
Washington, DC 20515

Dear Chairman Westerman and Ranking Member Grijalva:

The Atlantic States Marine Fisheries Commission (Commission) is writing in support of H.R. 5103, the Fishery Improvement to Streamline untimely regulatory Hurdles post Emergency Situation Act (or FISHES Act).

The Commission is a Compact of the 15 Atlantic coastal states that manages nearshore marine fisheries that occupy multiple states' waters. Congress approved the Compact in 1942 and granted the Commission management authority in 1984 and 1993 through the Atlantic Striped Bass Conservation Act and the Atlantic Coastal Fisheries Cooperative Management Act, respectively. Today, the Commission manages 27 of the coast's most productive and iconic fisheries, nine of which are cooperatively managed with our federal partners.

We are thankful for the procedural changes made to fisheries disaster determinations by the Fishery Resource Disaster Improvement Act. The FISHES Act is an appropriate next step in addressing further delays in the process. This bill, should it be enacted into law, would help us get rapid relief into the hands of those who need it most.

Our member states have experienced significant delays between when a disaster occurs and when the funding finally reaches affected stakeholders. Examples of this can be seen with the Atlantic herring disaster, which affected the greater Atlantic region in 2019, and with the 2018 Georgia and South Carolina penaeid shrimp disaster. Those impacted by these events are finally receiving their assistance in 2023.

Five years is far too long for our stakeholders to wait on lifelines. The FISHES Act helps shorten this timeline in an effort to make the relief funds relevant to the stakeholders who have suffered. By imposing a strict timeline on the Office of Management and Budget, acknowledging their role in the delays, and adding transparency to the process, this bill would help improve the process and timing of distributing assistance to those impacted by fisheries disasters. For these reasons, ASMFC is supportive of the bill.

Please let me or my staff know if you have any questions or if the Commission can provide any additional information.

Sincerely,

ROBERT E. BEAL

GULF STATES MARINE FISHERIES COMMISSION
Ocean Springs, Mississippi

August 8, 2023

Hon. Bryon Donalds
U.S. House of Representatives
1719 Longworth House Office Building
Washington, DC 20515

Dear Congressman Donalds:

On behalf of the Gulf States Marine Fisheries Commission (GSMFC}, I write to you to express our support for H.R. 5103, "Fishery Improvement to Streamline untimely regulatory Hurdles post Emergency Situation Act (FISHES Act)."

The Gulf States Marine Fisheries Commission (GSMFC) is an organization of Texas, Louisiana, Mississippi, Alabama, and Florida whose coastal waters are in the Gulf of Mexico. Authorized under Public Law 81-66, the compact that created the GSMFC was signed by the representatives of the Governors of the five Gulf States on July 16, 1949.

Working with state agency leadership, commercial and recreational anglers, and other interested parties, one of the most important functions of the GSMFC is to serve as a forum for the discussion of various problems and programs of marine fisheries management, industry, and research and to develop a coordinated policy to address those issues for the betterment of the resource and all who are concerned. One of the major issues we face in the Gulf of Mexico are fisheries disasters that can cause sudden and unexpected losses, leading to serious economic impact for fishermen and their communities. In these instances, a state governor or an elected or duly appointed representative of an affected fishing community can request a fishery disaster determination from the Secretary of Commerce.

Unfortunately, the process is quite burdensome and extremely slow, and funding to the affected fisheries is distributed years after the impacts which is ineffectual in assisting the affected communities. The legislation aims to streamline this process so funding is provided in a timely manner to fishermen and their communities. The GSMFC and its membership wishes to express their support for requiring the Director of the Office of Management and Budget to approve or deny spend plans within a certain amount of time, and are appreciative of the Congressman's effort to make the fishery disaster determination process more efficient and timelier.

Please let me know if you have any questions or if GSMFC can provide any additional information.

Sincerely,

DAVID M. DONALDSON,
Executive Director

ANGLER ACTION FOUNDATION
Lake Worth Beach, Florida

September 14, 2023

Hon. Bryon Donalds
U.S. House of Representatives
1719 Longworth House Office Building
Washington, DC 20515

Re: FISHES Act

Dear Congressman Donalds:

Please accept my letter of support for the Fishery Improvement to Streamline untimely regulatory Hurdles post Emergency Situation Act [FISHES Act].

The intent of this Act—expediting the process of reviewing/awarding/rejecting federal funding requests related to natural disasters—will help ensure our fisheries and fishing industry are better prepared to recover from events that historically devastate both local fishing businesses (including commercial, charter, and recreationally based businesses), and the habitats that support the fisheries.

Regards,

BRETT FITZGERALD,
Executive Director

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION
Tallahassee, Florida

October 26, 2023

Hon. Bryon Donalds
U.S. House of Representatives
1719 Longworth House Office Building
Washington, DC 20515

Dear Congressman Donalds:

The Florida Fish and Wildlife Conservation Commission (FWC) is pleased to support H.R. 5103, the "Fishery Improvement to Streamline untimely regulatory Hurdles post Emergency Situation Act" or the "FISHES Act."

H.R. 5103 would improve the fishery disaster assistance process by establishing a 30-day deadline for the Office of Management and Budget (0MB) to approve a spend plan.

Historically, the federal fishery disaster assistance process has been plagued by delays, lack of transparency, and unpredictability from federal agencies. To improve the process and increase accountability and transparency, Public Law 117-328 established deadlines for the National Oceanic and Atmospheric Administration (NOAA) to make decisions. However, the law did not impose any deadlines on 0MB. H.R. 5103 would establish that much-needed deadline.

The FWC looks forward to working with you to advance H.R. 5103 to help those affected by fishery disasters.

Sincerely,

JESSICA MCCAWLEY,
Director

Sanibel-Captiva Conservation Foundation (SCCF)

October 26, 2023

Hon. Bryon Donalds
U.S. House of Representatives
1719 Longworth House Office Building
Washington, DC 20515

Re: FISHES Act

Dear Congressman Donalds:

The Sanibel-Captiva Conservation Foundation (SCCF) is a 501(c)(3) organization dedicated to the protection of the Sanibel and Captiva Islands and the surrounding coastal areas. As barrier islands situated in the Gulf of Mexico at the mouth of the Caloosahatchee River, the community of Sanibel and Captiva understand that our health, economy, and way of life is inextricably tied to the health of our waters. We are all too aware of the lasting impact that natural disasters have on our coastal communities and the fisheries they rely on. Long after a storm has passed, our communities are left picking up the pieces. Without expedited support, bolstering and restoring our economies can be difficult. We work diligently to protect the health of our fisheries, and our communities understand that strong fisheries and a strong environment translates to a strong economy. However, in the wake of a natural disaster, whether it is a major storm or a harmful red tide, it is impossible to continue to effectively utilize the resource. In these instances, it is necessary to quickly support the communities that rely on our fisheries. It is for this reason that SCCF supports the passage of the Fishery Improvement to Streamline untimely regulatory Hurdles post Emergency Situation Act (FISHES Act).

After Hurricane Ian our community experienced firsthand the devastation that follows a natural disaster. The outpouring of support we witnessed after the storm was truly phenomenal, with State and Federal agencies working together to ensure that relief made its way to those in need. However, even with this unified mission, relief could be slow at times. When a less visible disaster strikes, such as a red tide, the pace of relief can be even slower. By expediting the federal fishery disaster relief funding process and enacting a 30-day decision requirement for OMB to deny or approve the State's spend plan, the time spent recovering from storms could be reduced, and people could return to their jobs.

For those who live, work, and play in coastal communities our lives and livelihoods depend on the resources we utilize and manage. After a disaster strikes, relief is needed quickly to help communities recover. Even with relief, rebuilding is a slow and arduous process, but by passing the FISHES Act one of the hurdles to recovery can be removed. The passage of this act would help those in need get back on their feet and return to fishing, guiding, or otherwise utilizing our unique and healthy fisheries.

Sincerely,

JAMES EVANS,
CEO

Submissions for the Record by Rep. Newhouse

NATIONAL ASSOCIATION OF HOME BUILDERS

Hon. Cliff Bentz, Chairman
Hon. Jared Huffman, Ranking Member
Water, Wildlife & Fisheries Subcommittee
1324 Longworth House Office Building
Washington, DC 20515

Dear Chairman Bentz and Ranking Member Huffman:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I am writing to express our support for Rep. Newhouse's H.R. 5504, requiring the Director of the Fish and Wildlife Service (FWS) and the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration (NOAA), (collectively, the "Services") to withdraw proposed rules relating to the Endangered Species (ESA) Act of 1973.

This legislation would maintain the essential regulatory clarity and certainty sorely needed under the ESA's permitting regime. Among other beneficial changes enacted in 2019, NAHB supports the following revisions made: clarifying the definition of "unoccupied critical habitat" and improvements to section 7 interagency coordination requirements.

Our nation's home builders seek clear and consistently implemented regulations from the Services when designating critical habitat. Regrettably, the Services' proposed revisions to critical habitat designation fails to provide needed consistency nor clarity. The Administration's proposed revisions for designating critical habitat removes the obligation to demonstrate areas designated as "unoccupied critical habitat" in fact contains the physical or biological features needed to support the species.

Moreover, the Supreme Court's *Weyerhaeuser* ruling found areas designated as critical habitat (occupied or unoccupied) must actually be habitat for the species. Locking away swaths of land as "unoccupied critical habitat" because it *may* be capable of supporting species at some point in the future is not responsible land management.

NAHB members regularly undertake precautions to avoid impacting critical habitats. Builders who pull federal permits or receive federal financing, may be subject to the Services' section 7 interagency consultation process because the Services deem the activity to impact a critical habitat. Section 7 consultations are notoriously time consuming, convoluted, and unpredictable.

The 2019 amendments clarified the analysis used to measure the effects of an action on a critical habitat to be based on clear and substantial information, using the best scientific and commercial data available. This change significantly helped to reduce confusion surrounding the effects analysis conducted during section 7 consultation.

Disappointingly, the Services are seeking to delete the 2019 changes based on areas of *potential* confusion; the purported confusion is only potential, as opposed to actual confusion, and may never occur. Worse, the proposed changes to reasonable and prudent measures under the section 7 consultation regulations could allow the Services to impose compensatory mitigation requirements upon projects undergoing consultation. This would be a significant expansion of the Services' authority under ESA and one that Congress has not granted nor addressed under the statute.

NAHB fully recognizes the crucial balance between protecting our nation's wildlife and fauna and providing homes for Americans. The United States is experiencing a housing shortage of 1.5 million units, with land availability being one of the driving headwinds weighing production.[1,2]

For these reasons, it is significant to our nation's home building industry to ensure that the 2019 ESA revisions are retained, and NAHB calls upon Congress to withdraw the 2023 rules seeking to reverse their progress. Thank you.

Sincerely,

LAKE A. COULSON
Sr. Vice President & Chief Lobbyist

[1] https://www.nahb.org/news-and-economics/press-releases/2023/08/boosting-housing-production-can-ease-inflation
[2] https://eyeonhousing.org/2023/06/for-builders-lot-shortage-eases-but-is-still-a-problem/