H.R. 7544, H.R. 8308, H.R. 8811, AND DISCUSSION DRAFT OF H.R. ____, "ESA AMENDMENTS ACT OF 2024"

LEGISLATIVE HEARING

BEFORE THE

SUBCOMMITTEE ON WATER, WILDLIFE AND FISHERIES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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To: Subcommittee on Water, Wildlife and Fisheries Republican Members

From: Subcommittee on Water, Wildlife and Fisheries staff: Annick Miller, x58331 (annick.miller@mail.house.gov), Doug Levine (doug.levine@mail.house.gov), Kirby Struhar (kirby.struhar@mail.house.gov), and Thomas Shipman (thomas.shipman@mail.house.gov)

Date: Tuesday, July 9, 2024

Subject: Legislative Hearing on H.R. 7544, H.R. 8308, H.R. 8811, and a Discussion Draft of H.R. ____ (Rep. Westerman)

The Subcommittee on Water, Wildlife and Fisheries will hold a legislative hearing on H.R. 7544 (Rep. Maloy), "*Water Rights Protection Act of 2024*"; H.R. 8308 (Rep. Harder), "*Nutria Eradication and Control Reauthorization Act of 2024*"; H.R. 8811 (Rep. Wittman), "*America's Conservation Enhancement Act of 2024*"; and a Discussion Draft of H.R. ____ (Rep. Westerman), "*ESA Amendments Act of 2024*"; on **Tuesday, July 9, 2024, at 2 o'clock p.m. in 1324 Longworth House Office Building**.

Member offices are requested to notify Lindsay Walton (lindsay.walton @mail.house.gov) by 4:30 p.m. on Monday, July 8, 2024, if their Member intends to participate in the hearing.

I. KEY MESSAGES

- Committee Republicans have made reforming and modernizing the Endangered Species Act (ESA) a policy priority of the 118th Congress.
- The U.S. Supreme Court's opinion in *Loper Bright Enterprises v. Raimondo* highlights the need for congressional specificity and thoughtful legislative work.
- The U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration has relied upon *Chevron* deference in defending ESA regulations for decades. The Westerman Discussion Draft refocuses the ESA on recovery, empowering state and private led species conservation, increasing transparency, and ensuring accountability for regulatory agencies.
- H.R. 7544 would prevent federal overreach and protect state primacy over regulating water rights within their borders.
- H.R. 8308 would reauthorize funding to combat the infestation of Nutria.
- H.R. 8811 would reauthorize conservation programs funded by the FWS and make necessary technical amendments to these programs to ensure their effective implementation.

II. WITNESSES

Panel I

- Members of Congress TBD

Panel II

- **Mr. Stephen Guertin**, Deputy Director for Program Management and Policy, U.S. Fish and Wildlife Service, Washington, DC (all bills)
- **Mr. Mauricio Guardado**, General Manager, United Water Conservation District, Oxnard, CA (Westerman Discussion Draft)
- **Dr. Kirk Havens**, Director of the Center for Coastal Resource Management, Virginia Institute of Marine Science, Gloucester Point, VA (H.R. 881)
- **Dr. Brian Steed**, Great Salt Lake Commissioner, Office of the Great Salt Lake Commissioner, Salt Lake City, UT (H.R. 7544)
- **Ms. Ellen Richmond**, Senior Attorney, Biodiversity Law Center, Defenders of Wildlife, Washington, DC (ESA Discussion Draft) [Minority witness]

III. BACKGROUND

Discussion Draft of H.R. ____ (Rep. Westerman), "*ESA Amendments Act of 2024*"

Definitional Changes and Additions

The bill would codify the Trump administration's framework for determining the "foreseeable future" when determining whether a species qualifies as threatened under the Endangered Species Act (ESA).[1] This means that when the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration (Services) consider the "foreseeable future", it can extend only so far into the future as the Services can reasonably determine that both the threats and the species responses to those threats are likely.[2] Prior to the adoption this framework, "foreseeable future" was undefined causing inconsistences in how the term was applied. The Biden administration has signaled their interest in rescinding this framework.[3]

The bill would also codify the Trump administration's definition of "habitat" as it relates to the designation of critical habitat. On December 16, 2020, the Services published a final rule "[f]or the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species."[4] This was in response to the 2018 U.S. Supreme Court decision in *Weyerhaeuser Co. v. U.S. FWS*, which stated an area must logically be considered "habitat" for that area to meet the definition of "critical habitat" under the ESA.[5]

The Biden administration rescinded the 2020 regulatory definition of "habitat" in 2022, giving the Services the discretion in designating critical habitat.[6] This includes the ability to designate critical habitat in areas that are **not** [emphasis added] currently occupied by the species in question and in some cases, have not been occupied in decades and may never be occupied. By codifying the definition of "habitat" as it relates to critical habitat, this bill provides certainty and brings the Services in compliance with the *Weyerhaeuser* decision.

The bill would also codify into law a definition of "environmental baseline" into the ESA statute. When conducting interagency consultations on federal actions, the Services use the environmental baseline to help determine the effect on listed species and critical habitat by that action. On April 5, 2024, the Services finalized a rule that mandated the following factors be considered when calculating the environmental baseline: 1) the past and present effects of all activities in an action area; 2) the anticipated effects of each proposed federal project in an action area where consultation has been completed; 3) the effects of state and private actions that are contemporaneous with the consultation process; and 4) the impacts to listed species or designated critical habitat from ongoing federal agency activities or existing federal agency facilities that are not within the agency's discretion to modify.[7]

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[1] 84 FR 45020
[2] *Id.*
[3] 89 FR 23919
[4] "Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat." 87 FR 37757. Federal Register: Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat
[5] "Final Rules Amending ESA Critical Habitat Regulations." Erin H. Ward and Pervaze A. Sheikh. Congressional Research Service. IF11740 (congress.gov)
[6] "U.S. Fish and Wildlife Service and NOAA Fisheries Rescind Regulatory Definition of "Habitat" Under the Endangered Species Act." Marilyn Kitchell and Lauren Gaches. U.S. Fish and Wildlife Service. 6/23/2022. Rescind Regulatory Definition of "Habitat" Under the Endangered Species Act/U.S. Fish & Wildlife Service (fws.gov)
[7] 89 FR 24268

This bill would amend and replace the fourth consideration with: "the ongoing impacts to listed species or critical habitat from existing facilities or activities that are not caused by the proposed action or that are not within the discretion of the Federal action to modify." The environmental baseline should act as a "snapshot" of a species health at the time of the consultation. However, too often the Services have used the environmental baseline to create a hypothetical environment that ignores existing infrastructure. This would require the Services to use a more complete picture of current impacts to species.

Title I: Optimizing Conservation Through Resource Prioritization

Title I amends section 4 to codify into law existing agencies' efforts to address current backlogs in listing petitions and critical habitat designation through a "National Listing Work Plan." [8] These changes would decrease the risk of litigation in the listing process and allow the Services to better allocate their resources toward species most in need of protection. The Services would be required to submit a work plan to Congress at the beginning of each fiscal year that covers listing actions for the next seven fiscal years. The work plan must include information on species status reviews, listing determinations, and critical habitat designations.

The Services would be required to assign each species included in the work plan a priority classification, with priority 1 being the highest and priority 5 being the lowest. For example, a priority 1 species would be classified as critically imperiled and in need of immediate action. Whereas a priority 5 species is a species for which little information exists regarding threats and the status of the species.

Title II: Incentivizing Wildlife Conservation on Private Lands

The ESA was enacted in 1973:

> To provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth [in the Act].[9]

Unfortunately, the ESA has been ineffective in accomplishing its goal of recovering species and taking them off the endangered species list, with only three percent of species listed under the Act having ever been delisted.

Private lands play a significant role in managing and recovering endangered and threatened species. As Aldo Leopold put it, "conservation will ultimately boil down to rewarding the private landowner who conserves the public interest." [10] In 2023, the FWS reported that "two-thirds of federally listed species have at least some habitat on private land, and some species have most of their remaining habitat on private land." [11] For example, according to the Audubon Society, more than 80 percent of the grassland and wetlands that provide essential bird habitat are in private ownership.[12]

To incentivize private landowners to invest in wildlife conservation on their lands, the legislation amends the ESA to provide regulatory certainty to private landowners. This is done by codifying into law Candidate Conservation Agreements (CCAs) and Candidate Conservation Agreements with Assurances (CCAAs). These agreements allow private landowners to commit to implementing voluntary actions designed to reduce threats to a species that is a candidate to be listed under the ESA. In return, if the species is listed, landowners who are part of the agreement would be able to continue their operations should a listing take place. Currently, these agreements only exist through executive action and secretarial orders, giving the Services great discretion in how they take these agreements into account when making listing decisions. The bill explicitly states that the Services must take the conservation benefit of these agreements into account when making listing decisions.

In addition, the legislation would give regulatory certainty to the private landowners who are investing in, or want to invest in, habitat conservation on their

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[8] "National Listing Workplan." U.S. Fish and Wildlife Service. National Listing Workplan/U.S. Fish & Wildlife Service (fws.gov)

[9] Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.

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

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

[12] Wilsey, CB, J Grand, J Wu, N Michel, J Grogan-Brown, B Trusty. 2019. North American Grasslands. National Audubon Society, New York, New York, USA. https://nas-national-prod.s3.amazonaws.com/audubon_north_american_grasslands_birds_report-final.pdf

lands. Specifically, the bill prohibits the Services from designating critical habitat on private lands that are implementing habitat conservation and restoration actions designed to conserve the species in question and approved by the Services. This language mirrors language from the Sikes Act (16 U.S.C. 670a), which prevents critical habitat designations on lands controlled by the Department of Defense if those lands are implementing approved habitat conservation measures.

Title III: Providing for Greater Incentives to Recover Listed Species

The ESA requires the Services to "cooperate to the maximum extent practicable with the states" in implementing the Act, including "consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species."[13] Unfortunately, over the course of the ESA's fifty-year history, states have often been left out of the process, with power being consolidated in the hands of officials at the Services. This title reasserts congressional intent by giving regulatory incentives and opportunities for states in the ESA process.

Section 9 prohibits the "take" of an endangered species. Take is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct."[14] The Act, however, does not automatically apply the same prohibitions to threatened species. Instead, Section 4(d) gives the Services the discretion to grant some exceptions to the take prohibitions for threatened species.[15] While the National Oceanic and Atmospheric Administration (NOAA) has taken advantage of this flexibility,[16] the FWS continues to take steps to manage threatened species as endangered species, counter to congressional intent.[17]

The FWS began issuing 4(d) rules in 1974, but in 1975 they finalized what has become known as the "blanket 4(d) rule" (blanket rule).[18] This rule allowed the FWS to extend all Section 9 prohibitions to threatened species unless a specific 4(d) rule for the species was drafted that exempted certain activities from those prohibitions. The blanket rule effectively removes incentives for parties impacted by threatened species and any of the benefits that result in downlisting a listed species because no regulatory burdens are lowered. In 2019, the Trump administration finalized a rulemaking that took away the FWS's ability to issue blanket rules,[19] but this rule was rescinded by the Biden administration earlier this year.[20]

The legislation changes this dynamic by requiring the Services to include the following whenever they issue a 4(d) rule that contains take prohibitions: (1) objective, incremental recovery goals for the species in question; (2) provide for the stringency of the prohibitions to decrease as such recovery goals are met; and (3) provide for state management of the species once all recovery goals are met in preparation for the species being delisted.

These steps create greater accountability, transparency, and incentives to take conservation actions that restore habitat for and recover listed species because tangible regulatory relief will come with it. The bill also adopts a similar approach for the recovery of species listed as endangered. Specifically, the bill requires the Services to propose objective and incremental recovery goals for endangered species. Those goals would form the basis for a 4(d) rule when the species is downlisted to threatened species status.

This gives states the opportunity to propose a "recovery strategy" for threatened species and species that are candidates for listing in that state. The bill requires the Services to review the proposed recovery strategy and determine whether 1) the state would be able to implement the strategy and 2) whether that strategy would be effective in conserving the species in question. If it is determined that both of those tests are satisfied, the strategy is approved, and it would become the regulation governing the species in that state.

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[13] Endangered Species act of 1973, 16 U.S.C., 1531-1544 (1973).
[14] 16 USC Ch. 35. Sec 1532.
[15] 16 USC Ch. 35. Sec 1533.
[16] 88 FR 40742.
[17] Revisions of the Regulation for Prohibitions to Threatened Wildlife and Plants." Megan E. Jenkins and Camille Wardle. The Center for Growth and Opportunity at Utah State University. 10/17/18. Regulations for Prohibitions to Threatened Wildlife and Plants—The CGO.
[18] "Unlocking the Full Power of Section 4(d) to Facilitate Collaboration and Greater Species Recovery." David Willms, J.D. https://republicans-naturalresources.house.gov/UploadedFiles/Codex_II_Chapter_3.pdf.
[19] 84 FR 44753
[20] 89 FR 23919

In addition, the bill amends the definition of "conserve," "conserving," and "conservation" to allow for the regulated take of threatened species. Currently, the definition only allows for regulated take "in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved."[21] This standard has been interpreted by federal courts to mostly prohibit any regulated take of threatened species.[22] This raises tensions with the public, who have no means to control populations of listed species, even when the population of that species is well above its population goals. Additionally, it amends the definition to allow for regulated take "at the discretion of the Secretary," therefore granting additional flexibility to the Services.

Lastly, Title III would also amend section 4(g) to require the Services to monitor, in cooperation with the states, the status of a species for no less than five years after it is delisted to ensure it does require relisting. A provision is included which prohibits judicial review on the delisting of species during the five-year post-delisting monitoring period. There are many examples of species that have been successfully delisted through rigorous scientific decisions, such as wolves and grizzly bears, only to have a court overrule that decision.

Title IV: Creating Greater Transparency and Accountability in Recovering Listed Species

Title IV amends the ESA to require the "best scientific and commercial data available" used to make listing and critical habitat decision be readily available and accessible online. ESA-related regulations are often controversial and impact the public in many ways, including land use, access to natural resources, and the value of property. In many cases, all the public gets to see is the result of a decision-making process, but not what led to that decision being made. The bill gives the public the ability to understand what the Services identified as the "best scientific and commercial data available."

Additionally, the Services would be required to coordinate with states when making listing and critical habitat decisions. Before finalizing an ESA regulation, the Services must provide each affected state the data used as the basis of a regulation. The bill defines "best scientific and commercial data available" to include all such data submitted to the Services by state, tribal, and local governments.

The Services would be required to disclose to Congress and make publicly available, each fiscal year, all federal government expenditures on ESA-related lawsuits. The ESA has become a magnet for lawsuits designed to frustrate the process laid out in the underlying statute, with the Services often settling with litigious environmental groups.

Lastly, Title IV requires an analysis of the economic impacts, national security impacts, and any other relevant impacts concurrently with any listing decision. This section wouldn't preclude a species from being listed for economic and national security reasons but would give the public necessary information on how a listing may impact them. Currently the ESA only requires an analysis of economic and national security impacts be done when designating critical habitat. Areas can be excluded from critical habitat for these reasons.

Title V: Limitation on Reasonable and Prudent Measures

On April 5, 2024, the Services finalized a rule that made changes to the interagency consultation process on federal projects.[23] Included in this rule is a provision that allows the Services to impose measures that "offset" any remaining impacts on a species caused by an agency action, after avoidance and minimization measured have been imposed. This provision greatly expands the discretion of the Services. Allowing the Services to require offsets for any residual impacts from an agency action on a listed species is not supported by ESA statute. As written, Section 7 requires federal agencies and project applicants to "minimize" impacts to listed species and critical habitat.[24] The words "offset" or "mitigate" are not mentioned. To further clarify this, the bill amends Section 7 to explicitly state that federal agencies and project applicants are not required to fully offset impacts to listed species and critical habitat.

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[21] 16 USC Ch. 35. Sec 1532.

[22] "Unlocking the Full Power of Section 4(d) to Facilitate Collaboration and Greater Species Recovery." David Willms, J.D. https://republicans-naturalresources.house.gov/UploadedFiles/Codex_II_Chapter_3.pdf.

[23] "Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation" 89 FR 24268 https://www.federalregister.gov/documents/2024/04/05/2024-06902/endangered-and-threatened-wildlife-and-plants-regulations-for-interagency-cooperation

[24] 16 U.S.C. 1536

H.R. 7544 (Rep. Maloy), *"Water Rights Protection Act of 2024"*

H.R. 7544 requires that any federal action taken by the Departments of the Interior and Agriculture (Departments) that impact water rights impose no greater restriction on those rights than applicable state law and does not adversely affect state authority over water rights. In addition, the bill prohibits agencies within the Departments from acquiring state recognized water rights as a condition of federal permits, leases, allotments or other land use agreements.

Western states have historically held the right to their own water rights, however in the 1920s the federal government began to pursue the establishment of water rights with increased frequency. During this period, the federal government could not be bound by a water rights determination in state court because the federal government was immune from state court decisions.[25] This changed in 1952 when Congress passed the so called "McCarran Amendment" (43 U.S.C. 666), which waived the federal government's immunity from State court decisions and laws to such proceedings. This landmark law continued a tradition of federal deference to State water laws but put in place a framework under which the federal government was treated like a private entity for the purposes of seeking water rights within western States.[26]

The issue of the relationship between federal agencies and State water rights resurfaced in 2014 when the United States Forest Service (USFS) published a press release stating that USFS needed to "improve the Forest Service's ability to manage and analyze the potential uses of National Forest Service (NFS) land that could affect groundwater resources."[27] The Forest Service indicated that this proposal would not impact a state's ability to manage their own water rights despite the proposal including that the Forest Service would "evaluate all applications to States for water rights on NFS lands and applications for water rights on adjacent lands that could adversely affect NFS groundwater resources."[28] For example, in 2011 USFS issued a national interim directive for all 122 public land ski areas in the United States. The directive included a clause requiring applicant ski areas to relinquish privately held water rights to the United States as a permit condition.[29]

This bill would ensure the long standing precedent giving States primacy over water rights determinations. Similar versions of this bill have been introduced each Congress since the 113th Congress. A similar version of this bill passed the House by a bipartisan vote of 238–174 during the 113th Congress[30] and another was reported favorably by the Committee on Natural Resources in the 115th Congress.[31] H.R. 7544 has five Republican co-sponsors.

H.R. 8308 (Rep. Harder), *"Nutria Eradication and Control Reauthorization Act of 2024"*

H.R. 8308 reauthorizes the Nutria Eradication and Control Act of 2003 through 2030. Nutria is native to South America but were introduced to North America in 1899 for fur production.[32] The original act authorized the Secretary of the Interior to provide financial assistance to Maryland and Louisiana because of the damages inflicted onto marshlands by nutria; an estimated 17 percent of the Chesapeake Bays marshlands had been destroyed at the time of original passage. The bill was amended in 2020 to include any state that has demonstrated the need for the program.[33] The Chesapeake Bay Nutria Eradication Project (CBNEP) has been successful, as nutria were declared eradicated in the state of Maryland as of 2022.[34] Efforts have also been successful in California, where 4,338 nutria have been taken since

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[25] Bill Report, Water Rights Protection Act of 2017. July 25, 2017.
[26] Id.
[27] United States Department of Agriculture: U.S. Forest Service Proposes New Management Practices for Stewardship of Water Resources, May 5, 2014 (press release).
[28] Forest Service Groundwater Resource Management Chapter 2560.03.03; p. 9-10.
[29] Bill Report, Water Rights Protection Act of 2017. July 25, 2017.
[30] Text—H.R. 3189—113th Congress (2013–2014): Water Rights Protection Act/Congress.gov/Library of Congress
[31] Actions—H.R. 2939—115th Congress (2017–2018): Water Rights Protection Act of 2017/Congress.gov/Library of Congress
[32] Bill Report, To Amend the Nutria Eradication and Control Act of 2003 to Include California in the Program, and for Other Purposes. February 25, 2020.
[33] Public Law 116-186
[34] USWFS, Decades-long Partnership Eradicates Destructive Nutria Rodents from Maryland. September 16, 2022. https://www.fws.gov/press-release/2022-09/decades-long-partnership-eradicates-destructive-nutria-rodents-maryland.

2017,[35] and to a larger extent in Louisiana, where 5,549,662 nutria have been taken after an estimated 432,012 acres were damaged between 2002 and 2021.[36]

H.R. 8308 reauthorizes the program at existing appropriations levels through 2030 in compliance with floor protocols. This bipartisan legislation has two Republican cosponsors, including WWF Subcommittee member Garret Graves (R-LA), and two Democratic cosponsors.

H.R. 8811 (Rep. Wittman), "*America's Conservation Enhancement (ACE) Act of 2024*"

H.R. 8811 would reauthorize and amend conservation programs authorized under the original ACE Act, which was passed by Congress and signed into law in 2020.[37] Title I of the bill includes reauthorizations of successful conservation programs like the North American's Wetlands Conservation Program, the Chronic Wasting Disease Task Force, and several programs related to the Chesapeake Bay region. Title I would also make technical amendments to several programs from the original ACE Act, such as clarifying that federal agencies may enter into an agreement with the National Fish and Wildlife Foundation to administer a federal grant program for no less than five years and no more than 10 years. Each of the programs in Title I would be reauthorized through fiscal year 2030 at existing authorized appropriations levels.

Title II of the bill would reauthorize and make technical changes to the National Fish Habitat Partnership (NFHP). Technical changes include modifying the composition of the National Fish Habitat Board to ensure representation from Tribes, Regional Fishery Management Councils, and Marine Fisheries Commissions. The bill would reauthorize NFHP through fiscal year 2030 at existing authorized appropriations levels.

H.R. 8811 is cosponsored by two Republicans and two Democrats; these include Subcommittee members Rep. Jen Kiggans (R-VA) and Rep. Debbie Dingell (D-MI).

IV. MAJOR PROVISIONS & SECTION-BY-SECTION

Discussion Draft of H.R. ____ (Rep. Westerman), "*ESA Amendments Act of 2024*"

- Section by section document.

H.R. 7544 (Rep. Maloy), "*Water Rights Protection Act of 2024*"

- Mandates the Departments of the Interior and Agriculture recognize the long-standing authority of states to regulate water use and coordinate with states to ensure that any rule, policy, directive, management plan, or other federal action imposes no greater regulatory requirements than applicable water law.
- Mandates the Departments do not assert any connection between surface water and groundwater that is inconsistent with state water law. Also mandates that those departments not adversely affect state authority to permit the beneficial use of water or adjudicating water rights.
- Prohibits agencies within the Departments from acquiring state recognized water rights as a condition of federal permits, leases, allotments or other land use agreements.
- Clarifies that the bill does not impact or effect reclamation contracts, ESA implementation, federal reserved water rights, the Federal Power Act, Indian water rights, federally held state water rights, and interstate compacts.

H.R. 8308 (Rep. Harder), "*Nutria Eradication and Control Reauthorization Act of 2024*"

- Reauthorizes the Nutria Eradication and Control Act of 2003 through fiscal year 2030.

H.R. 8811 (Rep. Wittman), "*America's Conservation Enhancement (ACE) Act of 2024*"

- Section by section document.

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[35] California Department of Fish and Wildlife, Discovery of Invasive Nutria in California, May 16, 2024. https://wildlife.ca.gov/Conservation/Invasives/Species/Nutria/Infestation

[36] Herbivory Damage and Harvest Maps. Louisiana Department of Wildlife and Fisheries. https://nutria.com/nutria-control-program/herbivory-damage-and-harvest-maps/

[37] Public Law 116-188

V. COST

A formal cost estimate from the Congressional Budget Office (CBO) is not yet available.

VI. ADMINISTRATION POSITION

The administration's position on these bills is currently unknown.

VII. EFFECT ON CURRENT LAW

H.R. 8308

https://naturalresources.house.gov/uploadedfiles/h.r._8308_-_ramseyer.pdf

H.R. 8811

https://naturalresources.house.gov/uploadedfiles/bill-to-law_h.r._8811.pdf

Westerman Discussion Draft

https://naturalresources.house.gov/uploadedfiles/bill-to-law_discussion_draft_on_hr_____rep._westerman.pdf

LEGISLATIVE HEARING ON H.R. 7544, TO PROHIBIT THE CONDITIONING OF ANY PERMIT, LEASE, OR OTHER USE AGREEMENT ON THE TRANSFER OF ANY WATER RIGHT TO THE UNITED STATES BY THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF AGRICULTURE, AND FOR OTHER PURPOSES, "WATER RIGHTS PROTECTION ACT OF 2024"; H.R. 8308, TO REAUTHORIZE THE NUTRIA ERADICATION AND CONTROL ACT OF 2003, "NUTRIA ERADICATION AND CONTROL REAUTHORIZATION ACT OF 2024"; H.R. 8811, TO REAUTHORIZE THE AMERICA'S CONSERVATION ENHANCEMENT ACT, AND FOR OTHER PURPOSES, "AMERICA'S CONSERVATION ENHANCEMENT REAUTHORIZATION ACT OF 2024"; AND DISCUSSION DRAFT OF H.R. ____, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO OPTIMIZE CONSERVATION THROUGH RESOURCE PRIORITIZATION, INCENTIVIZE WILDLIFE CONSERVATION ON PRIVATE LANDS, PROVIDE FOR GREATER INCENTIVES TO RECOVER LISTED SPECIES, CREATE GREATER TRANSPARENCY AND ACCOUNTABILITY IN RECOVERING LISTED SPECIES, AND LIMIT REASONABLE AND PRUDENT MEASURES, "ESA AMENDMENTS ACT OF 2024"

Tuesday, July 9, 2024

U.S. House of Representatives

Subcommittee on Water, Wildlife and Fisheries

Committee on Natural Resources

Washington, DC

The Subcommittee met, pursuant to notice, at 2:12 p.m. in Room 1324, Longworth House Office Building, Hon. Cliff Bentz [Chairman of the Subcommittee] presiding.

Present: Representatives Bentz, Wittman, Graves, LaMalfa, Kiggans, Hageman, Westerman; Huffman, Mullin, Hoyle, Dingell, and Porter.

Also present: Representatives Maloy, Newhouse; Beyer, and Harder.

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

Without objection, so ordered.

I also ask unanimous consent that the Congressman from Washington, Mr. Newhouse and the Congresswoman from Utah, Ms. Maloy be allowed to participate in today's hearing.

Without objection, so ordered.

We are here today to consider four legislative measures: H.R. 7544, Water Rights Protection Act of 2024, sponsored by Representative Maloy of Utah; H.R. 8308, Nutria Eradication and Control Reauthorization Act of 2024, sponsored by Representative Harder of California; H.R. 8811, America's Conservation Enhancement Reauthorization Act of 2024, sponsored by Representative Wittman of Virginia; and a discussion draft, the ESA Amendments Act of 2024, sponsored by Chairman Westerman of Arkansas.

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. I want to thank the Members that are joining us today and their interest in the bills we are considering. I also want to thank the witnesses that traveled to Washington to be here.

We look forward to hearing from you.

Today, the Subcommittee on Water, Wildlife and Fisheries will examine four bills that protect states' water rights, promote conservation of vital ecosystems, extend existing law regarding rodent eradication, and make necessary important reforms to the Endangered Species Act.

Congresswoman Maloy's Water Rights Protection Act, H.R. 7544, would ensure that the Federal Government does not usurp states' rights to manage and adjudicate water within their borders. The legislation would ensure that the Federal Government does not condition the issuance or continuance of any Federal permit, lease, allotment, or any similar land use agreement on the transfer or purchase of water rights to the United States.

Congressman Harder's bill, H.R. 8308, would extend a successful program that helps control and hopefully eradicate rodents known as nutria. These non-native species are wreaking havoc on ecosystems across the country, including in my home state of Oregon.

Next, the America's Conservation Enhancement Reauthorization Act, H.R. 8811, introduced by Congressman Wittman, would reauthorize and amend many successful conservation programs. These include the North American Wetlands Conservation Act, the Chesapeake Bay program, and the National Fish and Wildlife Foundation. Today, this Committee will examine these programs and the proposed improvements included in the legislation. This will ensure we continue to provide measurable conservation outcomes and value to American taxpayers.

Finally, we will be and are considering the discussion draft of the ESA Amendments Act for 2024 offered by the Chairman of the Full Committee, Mr. Westerman. This bill would make important and necessary reforms to the Endangered Species Act, something that is important to all of us, including my constituents in Oregon who live each day with the consequences and harsh realities of the application of ESA policies. The draft legislation contains important provisions designed to provide regulatory certainty, transparency, and accountability.

Of importance is the inclusion of a consistent and reasonable approach to defining "critical habitat," so that it does not exceed that which is legally required.

Additionally, the draft bill includes a definition of the "environmental baseline" designed to address the inappropriate expansion of the application of the ESA to already existing situations and circumstances.

This discussion draft would require the U.S. Fish and Wildlife Service and NOAA to consider existing infrastructure within the action area of the project as part of the environmental baseline of that project, not as an effect of the project. This clarification gives agencies a more complete and precise understanding of what can and cannot be included in the ultimate decision, and also provides guardrails to assure that agencies are not exceeding the correct definition of environmental baseline.

In addition, the bill would mandate that the services implement incremental and objective recovery goals for listed species. The accomplishment of these goals would allow tangible regulatory reduction. In other words, the services would be required to define and describe success as it relates to species recovery and provide incentives to reach identified recovery goals.

I am sure there will be no shortage of rhetoric from my Democrat colleagues describing the bill as yet another attack on what they will say is a perfect, perfect law. Nothing could be further from the truth. This is a serious step toward moving away from the status quo of incredibly costly and largely ineffective Federal actions to an improved model of endangered species conservation that encourages landowners to help recover species.

I want to once again thank the Members and the witnesses for their time and interest today, and I look forward to an interesting discussion.

I now recognize Ranking Member Huffman for his 5-minute opening statement.

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

Mr. HUFFMAN. Thank you, Mr. Chairman and good afternoon everyone.

This is a time of divided politics, and that makes it especially great when we can find something that 84 percent of Americans actually agree on, and that is how popular the Endangered Species Act is. Americans overwhelmingly support this historically bipartisan, 51-year-old law, the most important tool that we have for preventing extinction and recovering threatened and endangered species. It may not be perfect, but it is a really good and important law.

This MAGA Majority has struggled to govern. They spend most of their time fighting with each other like ferrets in a phone booth. But they have an uncanny affinity for pushing things most Americans oppose, from abortion bans to the extreme culture wars and, here in this Committee, the endless attempts to undermine bedrock environmental laws. Some of my friends across the aisle come right out and say it, they want to repeal the Endangered Species Act. Others are a little more subtle. They push various proposals to "modernize," "improve," or "amend" the ESA, but always the same approach: weakening the law's core provisions.

As we consider the Chairman's latest proposal today we need to be honest about this pattern. I have reviewed every Republican proposal on the ESA this Congress, and several others going back several previous Congresses, and I have yet to see one that actually strengthens protections for listed species or gives wildlife agencies more resources to do their job and implement the ESA.

Every one of team extreme's proposals does the opposite, and the Chairman's bill to sabotage the listing process with delays and junk science, increase pressure for delisting, and undermine private ESA enforcement is just par for the course. We have seen this tired, anti-ESA agenda trotted out by team extreme and their Western Caucus allies so many times that it is like one of those cult movies, maybe the Rocky Horror Picture Show, where everyone knows the words.

Just this Congress, we have seen 86-and-counting Republican legislative attacks on endangered and threatened species. Despite this, because hope springs eternal, I agreed to be part of a Republican Endangered Species Act working group on the off chance that we could find some common ground. Unfortunately, the feedback and the ideas I brought to that conversation were disregarded. So, here we are again for the 87th time, watching The Rocky Horror Picture Show, with everybody singing let's do the Time Warp Again. This is getting old, folks.

Let's not pretend that the bill before us is somehow the culmination of a working group process or any other serious process. There is nothing new here. It is just the greatest hits of the pro-extinction agenda with a new album cover. You know these tunes, so feel free to sing along.

Codifying the pro-oil and gas Trump administration rules thrown out by the courts and overturned by the Biden administration.

Making it harder to list species by delaying listings and clouding them with junk science.

Making it easier to get rid of the ESA protections by blocking judicial review of delisting decisions.

Codifying certain partnerships and incentives for species recovery that the services are already doing, but in a way that actually removes incentives for voluntary ESA partnerships.

Trying to devolve the ESA authority to states with zero scientific rigor or assurances that it will work, while ignoring the existing ESA mechanism, Section 6 of the ESA, where states can already do this if they want to.

And who could forget the GOP's favorite hit of all? Attack the science. The Endangered Species Act only kicks in when a species is shown to be currently or foreseeably in danger of extinction based on the best available independent science, regardless of who produced the science. So, this little toe-tapper that we hear over and over from team extreme would simply mandate that anything from groups like the mining industry, Big Oil, or big developers that makes its way to a Federal agency, say through a state or county government, has to be deemed the best available science. And just like that, this clever little science swap would dismantle our strongest backstop to extinction.

These anti-ESA songs are getting old. This cult movie has been playing for too long. And seriously, folks, we have a biodiversity crisis. Instead of attempting to gut the ESA for the 87th time, we should work on strengthening and improving, truly modernizing it so we can save even more species and put more of them on a path to recovery.

Now, unfortunately, today's agenda doesn't stop with attacking the ESA. We also see Republicans once again looking to ram through their Water Rights Protection Act, which is bad for public lands, wildlife, and tribes.

I look forward to our conversation today, but I hope we can bring this conversation back at some point to good ideas for our public lands and our wildlife.

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.

With us today is Full Committee Chair Westerman, who is recognized for 5 minutes.

STATEMENT OF THE HON. BRUCE WESTERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARKANSAS

Mr. WESTERMAN. Thank you, Chairman Bentz, and thank you to the witnesses.

And Mr. Huffman, it is good to see you here today. A bit of a grouchy attitude, but good to have your opposing comments in order. And I think you will see that this is a serious discussion, and we are talking about doing things that are good for endangered species through the ESA Amendments Act of 2024.

And Mr. Chairman, my colleagues know where I stand when it comes to the Endangered Species Act. It is a well-intentioned law. It has done some good things, and I believe it is a necessary law. But it has been hijacked by litigation and executive overreach to

the detriment of the species that it is supposed to help recover. So, we do want to have a discussion today about how to strengthen the law to help endangered species.

But this law, the Endangered Species Act, has not been reauthorized by Congress since 1988. It has only been butchered by litigants and bureaucrats. It is in worse shape today than it was before. And in light of its dismal recovery success rate of only 3 percent, and also the recent Scotus decision on Chevron, it is without question that it is past time for Congress to take a fresh look at the ESA and refocus it back to its original intent of recovering listed species to the point where they no longer need to be protected.

Mr. Guertin, in his written testimony that, by the way, we only got late this morning, and which, not surprisingly, criticized our efforts to revive the law, the law that Federal agencies have helped diminish, his testimony did recognize that the mission of the ESA is to "recover ESA-listed species." Well, 57 recovered out of 1,732 listed, the 3 percent number, is not something that I think is acceptable. It is cliche, but doing the same thing over and over again expecting different results really is the definition of insanity.

The discussion draft that we are considering prioritizes recovery by empowering states and private landowners to invest in species conservation. It would also improve the implementation of the ESA by providing flexibility, transparency, and accountability throughout the listing, the delisting, and the consultation process.

First, it codifies the service's listing work plan. This will allow the services to focus on the species most in need of protection and provide the services with needed flexibility when listing petition workloads exceed their capacities to work through them pursuant to the timelines in the current ESA statute.

Second, the bill would incentivize and empower private landowners to invest in conservation of species on their lands. It does so by codifying into law candidate conservation agreements, including the newly-created Conservation Benefit Agreement.

Additionally, private landowners that invest in species conservation on their lands will be protected from punitive critical habitat designations on their property.

The bill would also reassert the intent of Congress that states should have a major role in the management and recovery of threatened species. The bill creates a formal process for states to propose recovery strategies to the services. This stands in stark contrast to how things often work today, where states help implement Federal decisions instead of having a seat at the table.

The bill would also reform the 4D process to require the services to establish objective and incremental recovery goals for threatened species. This means that, as recovery goals are met, regulations governing the species are eased to the point where management can be transferred to the state. This actually provides a roadmap to recovering species while giving the public tangible regulatory relief as the recovery process progresses.

This bill would also establish a similar framework for endangered species. The bill actually incentivizes the recovery of species versus the current scenario, where a listing simply means that the mighty U.S. Fish and Wildlife Service or another agency moves in

with a we-know-better-than-you mentality approach that appears more focused on appeasing litigants and special interests than recovering species.

Mr. Chairman, as I mentioned earlier, the services' own data show that we are failing at the ESA goal of recovering listed species. Of over, again, the 1,700 species listed, only 57 have been recovered and only 4 percent are actually improving. This bill would jumpstart the ESA by refocusing towards recovery.

Our founders didn't create a fourth branch of government experts because they knew it wouldn't work. It is a new day in the light of Chevron for Congress to start writing laws and updating laws as we are directly responsible and accountable to the American citizenry. There is not a better place to begin than with the ESA so we can actually get results when it comes to protecting species from extinction. If that is extreme, I want to be extreme.

I yield back.

Mr. BENTZ. I thank Chair Westerman for his testimony. I now recognize Congressman Wittman for 5 minutes.

STATEMENT OF THE HON. ROBERT J. WITTMAN, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF VIRGINIA

Dr. WITTMAN. Thank you, Mr. Chairman. I would like to thank you and Ranking Member Huffman for holding this hearing today and bringing up key legislation like the American Conservation Enhancement Reauthorization Act.

This bill is incredibly important. When its original inception came in 2020, it was all about making sure that we consolidated efforts to do things like enhance and clean up the Chesapeake Bay, one of our national treasures; to make sure, too, we looked across the spectrum about our natural resources across the country. We know how incredibly important this is. It is a generational advancement.

It really is, too, about not just getting the policy right, but making sure that the resources get to the right places, making sure that they are effectively used. And we know that making sure that we have conservation programs that continue to preserve wetlands, the nurseries for all the things that we enjoy or that folks enjoy in these areas, efforts to reduce pollution, to make sure we understand the latest technology that can do that, increasing recreational opportunities across the spectrum, all these things are the values that we derive from our natural resources.

Title I of this bill includes important programs like the North American Wetlands Conservation Act, better known as NAWCA, that has done an incredible job in conserving and preserving millions of acres of critical wetland habitat for nesting and wintering for our waterfowl and other critical species.

The National Fish and Wildlife Foundation Establishment Act, better known as NFWF, with lots of grants are given out through with NFWF through the years for some really important efforts that occur at the local level. It takes great ideas at the local level, and puts resources there to make sure things happen on the ground that actually enhance and conserve our natural resources.

The Chesapeake Bay program, which is a marquee program about how you bring states together, how you look at science-driven efforts to make sure we improve water quality, that we improve habitat, that we improve populations of critical species like crabs, oysters, and finfish.

The Chesapeake Bay Initiative Act of 1998, to make sure we put the proper policy perspectives across the different areas of responsibility. This is an inter-state pact. We have states involved. We have local governments involved. We have the Federal Government involved. We want to make sure that there is coordination and lack of duplication of resources, and we want to make sure resources are used in mutually exclusive ways that get the maximum benefit out of the dollars spent.

Also the Chesapeake Watershed Investments for Landscape Defense, better known as the WILD Act. It is very important, too, to make sure we preserve what makes the watershed special, and that is the uniqueness of its landscapes. Those things, I think, are at the very heart of this bill.

There are other things, too, that don't necessarily make the headlines, but are equally as important, things like the Chronic Wasting Disease Task Force. We know deer populations, mule deer populations, elk populations across the United States suffer through these epidemics. And many times, these populations are taken to precariously low levels in geographic areas. This studies how do we make sure that we understand the disease, how do we manage it at the very early stages to keep it from being widespread? It takes these populations years to recover from these massive outbreaks of disease, and we want to make sure we are getting those things right.

The Title II provision is the Fish Habitat Conservation Program through partnerships. This is an incredibly important program also that partners with local governments, with state governments on things we can do to preserve critical fish habitat. We all go back to those critical habitat places where we have nurseries for our fish to spawn, for fish fry to grow, to escape predation, and make sure they can grow to be spawners again to make sure we have healthy populations, to make sure we have good biomass across all spawning classes, to make sure we have things like fecundity. That is the success of those eggs hatching, actually turning into an adult fish. Those things are incredibly important. You have to have habitat to do that. You have to conserve that habitat. You have to make sure we enhance that habitat. You have to make sure, too, you are coordinating across government entities.

This bill brings together a large plethora of programs that have shown to be incredibly successful. This effort is to make sure that we authorize this, that we re-emphasize the things that we can do together, the importance of this habitat, the importance of marshaling resources in the most effective way possible. This is a great example of a bipartisan effort that has worked, worked incredibly well, and where we can do even more in the years to come to make sure that we are conserving not just the habitat, but the things that we treasure that rely on this habitat.

With that, Mr. Chairman, I yield back.

Mr. BENTZ. I thank Congressman Wittman for his testimony. I now recognize Congresswoman Maloy for 5 minutes.

STATEMENT OF THE HON. CELESTE MALOY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Ms. MALOY. Thank you, Mr. Chairman, for the opportunity to discuss my bill, H.R. 5744, the Water Rights Protection Act.

As a natural resources attorney with experience practicing in southern Utah, I know all too well the importance of safeguarding our most precious, most limiting resource, which is water. I have long held firm that the Federal Government should not get involved in state water issues, and we are here today to clarify what that means.

The Utah Constitution states that the water in the state belongs to the people of Utah. And in the 1866 Mining Act, the Federal Government recognized that water severed from public land and subject to allocation by the states. Yet, this vital resource has faced an ongoing threat, which is the overreach of Federal regulations that undermine our state water laws and threaten privately-owned water rights.

This bill, H.R. 7544, would prohibit the Departments of the Interior and Agriculture from undermining our water laws by requiring the transfer of co-ownership of water rights as a condition for permit agreement or renewals on Federal land. In a state like Utah, where the Federal Government manages the majority of our land, that is especially important. This bill acts as a shield against Federal overreach and it protects state sovereignty over our water. This has most commonly affected grazing allotment permits on BLM and Forest Service land, as well as ski areas in Utah.

Furthermore, this bill defends against the unlawful seizure of groundwater, recognizing that groundwater is a critical component of our water resources and has to be managed responsibly and in accordance with state law.

Equally important, the Water Rights Protection Act upholds the authority of states to manage their water resources. Here is why it matters. The Bureau of Land Management has asserted substantial reserved water rights claims in Utah and elsewhere under an Executive Order from 1926, the Public Water Reserve No. 107, PWR107. It is cited by BLM in support of 50 water rights claims filed in general adjudication efforts in Utah to have these water rights recognized as Federal Reserve water rights.

And in a post-Chevron world, as the Chairman has alluded, it is important for Congress to be clear about what we intend. And Congress doesn't intend for an executive action to trump Federal water law and allow agencies to interpret their jurisdiction more broadly and infringe on state water rights.

The Winters Doctrine does recognize some Federal jurisdiction over water rights, but it is narrow and should be narrowly interpreted and not over-interpreted to overreach into state water law. In *Winters v. United States*, 1908, the court said that when the Federal Government reserves land from the public domain for a Federal purpose, it also reserves water resources sufficient to fulfill the purpose, and that is as far as it should go.

Some examples from Utah. A Utah family who produces food from their ranching operation on public lands has had a water right for generations, but the Forest Service requested transfer of water rights as a condition of allowing the family to extend a water supply pipeline onto their Forest Service grazing allotment. Rather than comply, the family abandoned their effort, leaving an unfinished pipeline.

As a condition of installing six wells on BLM land for a grazing allotment, BLM required that a family apply for Utah water rights and drill the wells needed for the water rights to be perfected. The family filed the applications, drilled the wells at their own cost, and then the Bureau of Land Management required that the family transfer one-half of those newly acquired water rights to the United States as a condition of using their grazing permit.

Another illustration of Federal agency creativity in water rights acquisition comes through filing of so-called diligence claims. A Utah family filed a notice of a grandfathered water right from 1884. They refiled in 1976 and 1988 just to be clear on the law. After their 1988 filing, 6 days later, the Forest Service filed a diligence claim, claiming a water right from 1860. There was no Forest Service in 1860, and Utah was not yet a state in 1860. The only people who have been using water rights in Utah since 1860 are settlers, not the Federal Government.

The Forest Service and BLM filed a blizzard of these kind of diligence claims throughout the 1980s. There is no process in place to challenge diligence claims files except through litigation, which is expensive. A quick search of the Utah Division of Water Rights this week shows that the Forest Service and Bureau of Land Management have combined to file more than 15,000 diligence claims or similar claims on groundwater, many presenting dubious information as justification for this claim.

So, in conclusion, in a post-Chevron world, it is important that Congress be clear about what we intend when it comes to protecting states' sovereign water rights. This is an Act of Congress to show that water rights, Federal water rights, are limited to the Chevron Doctrine and to limit how water rights are applied under these circumstances.

I would also like to note that the 1976 Federal Land Policy and Management Act states that all actions by the Secretary concerned under this Act shall be subject to valid existing rights, including water rights adjudicated by states. Congress has been explicit in the limits it has established on sovereignty and states' rights for land management agencies.

And I would like to thank our witnesses for being here today.

With that, Mr. Chairman, I yield back.

Mr. BENTZ. I thank Congresswoman Maloy for her testimony. I thank the Members for their testimony.

Before I introduce our second panel I want to highlight that the Department of the Interior submitted its testimony at 10:06 a.m. today. Under Committee Rule 4(a), witnesses who are to appear before the Committee or Subcommittee shall file with the Director of Legislative Operations, or their designee, at least 2 business days before the day of their appearance a written statement of their proposed testimony. The Department received the bill lists for

this hearing on June 12. Today is July 9. It is unacceptable to submit testimony 4 hours before a hearing. I trust it won't happen again.

Mr. Guertin, I would ask, if you choose to address it, to please do so during the time I give you for your statement. With that, I will now introduce our second panel.

Steve Guertin, Deputy Director for Program Management and Policy with the U.S. Fish and Wildlife Service in Washington, DC; Mr. Brian Steed, Great Salt Lake Commissioner, with the Office of the Great Salt Lake Commissioner in Salt Lake City, Utah; Dr. Kirk Havens, Director of the Center for Coastal Resource Management for the Virginia Institute of Marine Science in Gloucester Point, Virginia; Ms. Ellen Richmond, Senior Attorney for the Defenders of Wildlife in Washington, DC; and Mr. Mauricio Guardado, General Manager of the United Water Conservation District in Oxnard, California.

Let me remind the witnesses that under Committee Rules, they must limit their oral statements to 5 minutes, but their entire statement will appear in the hearing record.

To begin your testimony, please press the "on" button on the microphone.

We use timing lights. When you begin, the light will turn green. When you have 1 minute remaining, the light will turn yellow. And at the end 5 minutes, the light will turn red, and I will ask you to please complete your statement.

I will also allow all witnesses to testify before Member questioning.

With that, I now recognize Mr. Guertin for 5 minutes.

STATEMENT OF STEVE GUERTIN, DEPUTY DIRECTOR FOR PROGRAM MANAGEMENT AND POLICY, U.S. FISH AND WILDLIFE SERVICE, WASHINGTON, DC

Mr. GUERTIN. Good afternoon, Chairman Bentz, Chairman Westerman, Ranking Member Huffman, and members of the Subcommittee. I appreciate the opportunity to testify before you today on two fish and wildlife conservation bills and a discussion draft to amend the Endangered Species Act.

But first I apologize, Chairman Westerman, Chairman Bentz, Ranking Member Huffman, members of the Committee, and the Committee staff for the lateness of our testimony. We will work as diligently as we can to ensure this does not happen again in the future. Thank you, sir.

The Service supports H.R. 8811 and H.R. 8308, which would reauthorize a range of important conservation programs that help the Service carry out our mission.

H.R. 8811 would reauthorize the ACE Act and extend the Service's authority to address a number of conservation challenges. For example, the bill would authorize the Service to turn our Black Vulture Livestock Protection pilot program into a permanent program. The bill would also build on our current success in 14 states that provides a process for livestock producers to get a sub-permit for black vulture depredation quicker and cheaper, while also ensuring that the Service adheres to requirements under the Migratory Bird Treaty Act to conserve black vulture populations.

The bill also reauthorizes the National Fish Habitat Partnership Program, which has provided over $320 million to 1,300 fish habitat projects in all 50 states. The bill would broaden representation on the board, streamline reporting, and improve operations across all 20 local partnerships. A number of other important programs address wildlife disease and invasive species. Waterfowl conservation would also be reauthorized by this bill.

We would welcome the opportunity to work with the Congress to strengthen H.R. 8811 in a few areas, and we note that, as with many of these programs, our ability to implement them as authorized is directly dependent on receiving the authorized appropriations.

H.R. 8308 would reauthorize the Nutria Eradication and Control Act through 2030. Nutria are an invasive rodent that destroy critically important wetlands. The Act authorizes the Secretary to provide financial assistance to states to implement nutria eradication and control measures. It similarly authorizes assistance to restore marshlands, wetlands, and agricultural lands damaged by nutria.

Our investments and strong partnerships have led to some successes, some quite significant. For example, the eradication of nutria from the Delmarva Peninsula, protecting over 250,000 acres of marshlands. We support H.R. 8308, which, if funded, would build on our current nutria control efforts and enhance our ability to work with state partners.

The discussion draft of the ESA Amendments Act of 2024 would amend multiple provisions of the ESA and would establish additional processes. We are facing an extinction crisis due to the growing effects of habitat loss, climate change, invasive species, disease, and unlawful wildlife trade. As our Director has testified before, the ESA is critical to our ability to accomplish our mission. It is remarkably successful at stabilizing species that are in trouble, and developing the roadmap and partnerships needed to recover species.

Our biggest challenge in implementing the Endangered Species Act is the mismatch between the large and increasing workload, and our funding and capacity. The staff we have on the ground working with partners are continually stressed to meet the workload. Our assessment is that the discussion draft would exacerbate this situation. It would reverse regulatory improvements and significant additional processes and requirements, reduce opportunities for engagement, and increase the complexity and cost of administering the ESA.

For example, our read of Title I, we think, would impose deadlines that aren't feasible given historic and recent appropriations, given last year's budget deficit agreement, and create additional administrative steps for work we are already doing.

Title II, for example, would require us to pre-emptively establish interim recovery goals for threatened species in our regulations. It also directs us to review states' recovery strategies and, if approved, adopt them in as a Federal 4(d) rule. Evaluating the language in Title IV, we think it would increase administrative work regarding litigation, and would pay any potential future monetary settlements from our base funding, compounding the budget challenges. Other aspects of this title may also have the

unintended consequence of chilling cooperation and sharing of information.

The Administration would oppose the discussion draft, if it were to be introduced as currently written. We are available to outline our concerns and provide specific feedback through the technical assistance process.

Thank you for the opportunity to testify today, and I would be pleased to answer any questions you have. Thank you, Mr. Chairman.

[The prepared statement of Mr. Guertin follows:]

PREPARED STATEMENT OF STEPHEN GUERTIN, DEPUTY DIRECTOR FOR POLICY, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

ON H.R. 8308, H.R. 8811, AND H.R. ____, "ESA AMENDMENTS ACT OF 2024"

Introduction

Good afternoon, Chairman Bentz, Ranking Member Huffman, and Members of the Subcommittee. I am Stephen Guertin, Deputy Director for Policy 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 three bills related to landscape-scale conservation, the Endangered Species Act (ESA), and the management of invasive species.

The mission of the Service is working with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. The Service's efforts to achieve this mission span a wide variety of programs, including those established to conserve migratory birds, combat wildlife disease, address invasive species, restore habitats, and recover ESA-listed species. The legislation before the Subcommittee today is relevant to a number of Service programs and our ability to carry out the Service's mission.

H.R. 8811, To reauthorize the America's Conservation Enhancement Act, and for other purposes

H.R. 8811 addresses a number of conservation issues, including livestock depredation by federally protected species, wildlife disease, invasive species, wetlands, the Chesapeake Bay, and the conservation and restoration of fish habitat. This legislation would reauthorize many Service programs through 2030, with several provisions receiving new or modified authorities. The Service appreciates the Subcommittee's interest in fish and wildlife conservation and management. The Service supports H.R. 8811 and would welcome the opportunity to work with the sponsor and Subcommittee to address recommended changes to the legislation. The Service offers the following comments on relevant provisions in the legislation.

Black Vulture Livestock Protection Program

Section 102 of H.R. 8811 authorizes a Black Vulture Livestock Protection Program and requires a study on black vulture take levels. The authorization provided in this section would continue the Service's existing pilot program, which was established to improve the permitting process for black vulture take under the Migratory Bird Treaty Act (MBTA).

Black vultures are large, scavenging birds that are present in the United States throughout the Mid-Atlantic and Southeast, as well as less frequently in the Southwest. As scavengers, they play an important role in maintaining healthy ecosystems by removing toxic bacteria and diseases that can spread from animal carcasses. Black vultures migrate from summer habitat in the Northeast to wintering habitat in Central and South America and are protected under the MBTA.

The Service understands that depredating black vultures continue to present challenges for livestock producers, and we are committed to improving black vulture management. In 2015, based on feedback from the agriculture industry and landowners, the Service began working with the Farm Bureaus of Kentucky and Tennessee on a pilot program to issue a depredation permit to the state Farm Bureaus, which could then more efficiently issue sub-permits to individual producers. The pilot was so successful that in 2021, the Service extended the program across the full range of black vulture populations, and it is now available to every state east of the Mississippi River, with 14 currently participating. In 2024, the Service offered permitted entities in each state the opportunity to double the

maximum take under sub-permits from a limit of five in 2023 to a limit of ten in 2024. To date, five states have opted to provide increased take limits to their sub-permittees.

The authorization provided in H.R. 8811 would allow the Service to apply lessons learned under the pilot program to our ongoing work with states and livestock producers to protect their assets while ensuring that proper data is collected for implementation and enforcement of the MBTA.

Chronic Wasting Disease Task Force

Sec. 103 would reauthorize funding through fiscal year (FY) 2030 for the Service to provide administrative support to the Chronic Wasting Disease Task Force (Task Force). The America's Conservation Enhancement Act (ACE Act) required a special resource study to identify the pathways and mechanisms of the transmission of chronic wasting disease (CWD). The Secretaries of the Department of the Interior and Department of Agriculture are currently working with the National Academy of Sciences to complete the required study, which is expected later this fiscal year. Under the ACE Act, the Task Force shall be established no later than 180 days after the completion of the study on CWD transmission.

Under the ACE Act, the Task Force would be composed of up to 111 federal, state, Tribal, and nongovernmental members. It is charged with collaborating with foreign governments to prevent or address CWD in the United States; developing recommendations and best practices on interstate coordination, research needs, and opportunities to leverage resources to address CWD; and developing an interstate action plan to stop the spread and mitigate the impacts of CWD.

The Service recognizes the threat that CWD poses to conservation and human health and believes the Task Force, once established, could enhance coordination and information-sharing between many parties. We would welcome the opportunity to work with the sponsor and Subcommittee to discuss minor technical edits to this section related to Task Force membership. The Service believes that further evaluation of current membership is needed to ensure the Task Force is able to achieve maximum productivity and allow for equitable representation across the national breadth of stakeholders.

In addition, although the ACE Act authorized up to $5 million annually for the Service to support the Task Force, Congress has not appropriated funding to the Service for this work. Without dedicated financial support, the Service would not be able to fund the necessary actions identified by the Task Force in the Interstate Action Plan.

North American Wetlands Conservation Act

Sec. 105 of H.R. 8811 would reauthorize funding for the North American Wetlands Conservation Act (NAWCA) through 2030. NAWCA is the only federal grant program dedicated to the conservation of wetland habitats for migratory birds.

Since 1991, nearly 7,000 partners have received more than $6.45 billion in funding to conserve wetland habitat and associated wildlife across more than 32 million acres of habitat through more than 3,300 projects in all 50 U.S. states, Canada, and Mexico. Announced in May, this year's NAWCA grants provided $84.3 million in funding, with an additional partner match of $139.8 million, to conserve, restore, or enhance 315,823 acres.

Wetlands are critically important for the one-third of bird species in North America that use wetland habitats and for more than half of all ESA listed species, which rely on wetland habitat. Wetlands conserved by NAWCA also provide essential habitat for a myriad of other native species, help buffer communities from storms and sea level rise, filter clean water, provide recreational opportunities for all Americans, and are a major contributor to the economy. At a time when we are experiencing a substantial net loss of vegetated wetlands in the United States, as documented in the Service's recent decadal Wetlands Status and Trends Report, reauthorization of NAWCA is critical.

National Fish and Wildlife Foundation Establishment Act

Created by Congress in 1984, the National Fish and Wildlife Foundation (NFWF) has been a critical partner to the Service in directing federal funding to the most pressing conservation needs and leveraging that funding with private investments to further conservation impacts. Working together on programs such as the Delaware River Basin Restoration Program, Chesapeake Watershed Investments for Landscape Defense (WILD), and the Monarch Butterfly and Pollinator Conservation Fund, the Service and NFWF have collaborated to benefit wildlife, habitat, and local communities around the globe.

Sec. 106 would reauthorize NFWF through 2030 and allow this important conservation partnership, and the programs that depend on it, to continue. The Service

supports reauthorization of NFWF, which has been an important partner in distributing funds to stakeholders. In addition, the Service has a fiduciary responsibility to ensure federal funding is used in compliance with federal financial assistance laws and Department of the Interior policies. The expanded authorities included in this reauthorization would limit the Service's options to provide that oversight role. Further, requiring a five-year minimum for federal funding agreements would present significant barriers for the Service to partner with NFWF, as the Service's funding is largely determined by annual appropriations, with five years serving as the maximum period of performance for accomplishing financial assistance objectives (with limited exceptions). We would welcome the opportunity to work with the Subcommittee and sponsor to better understand the intent of these amendments and ensure the Service can continue its work to support, oversee, and partner with NFWF to support conservation efforts across the country.

Chesapeake Bay

Sections 108, 109, and 110 of H.R. 8811 refer to programs that protect and conserve the Chesapeake Bay. Most relevant to the Service, Sec. 110 would reauthorize the Chesapeake WILD program through 2030.

The Chesapeake Bay is the largest estuary in the U.S. and supports an estimated 3,600 species of plants and animals. Nearly one million waterfowl, approximately one-third of the Atlantic Flyway's population, stop to winter on or near the bay. The ecological health of the watershed also directly impacts the well-being and economic strength of the more than 18 million people who live and work near the bay.

Since enactment of Chesapeake WILD in the original ACE Act in 2020, the Service, in partnership with NFWF, has carried out a non-regulatory, partnership-driven conservation investment program that focuses on restoring, conserving, and connecting habitat and improving recreational access to nature. Through the Chesapeake WILD program, the Service's Science Applications program has provided technical assistance to dozens of partners to ensure projects are carried out in a strategic manner that leverages the collective efforts of stakeholders in the Bay. However, appropriations directed to the Chesapeake WILD Act, and other watershed-based funding programs, should be supplementary to Science Applications' base budget to ensure that the Service can allocate resources to conservation efforts nationwide. While directed spending can increase the Service's ability to deliver important conservation programs and outcomes in priority watersheds and landscapes, other essential work that doesn't receive the same directed spending can face shortfalls. Science Applications provides critical support to the Chesapeake Bay and other landscapes across the country, including the sage brush ecosystem, Great Lakes, coastal areas, and grasslands.

In its first two years, the Chesapeake WILD program awarded $11 million through 36 grants, and leveraged an additional $15 million in grantee matching funds, to improve access to 31 miles of river and trails, restore 32 riparian miles of forest habitat, improve passage along 130 river miles for migratory fish, and protect more than 8,000 acres of fish and wildlife habitat. Chesapeake WILD continues to prioritize projects that benefit not only fish, wildlife, and their habitats, but also people. Reauthorization of the Chesapeake WILD program through H.R. 8811 would allow the program to continue its legacy of creating meaningful and lasting conservation outcomes in the watershed.

National Fish Habitat Conservation Through Partnerships

Healthy native fish populations are a sign of healthy ecosystems. They are important to local economies and to the well-being of our citizens. The Service works through a number of programs with many partners to conserve, protect, and enhance native fish populations. One key program is National Fish Habitat Partnerships (NFHP).

Title II of H.R. 8811 would reauthorize the existing NFHP program through 2030, while making several changes to its current structure and authorities. H.R. 8811 would add two additional members to the NFHP Board by including a representative from the Bureau of Land Management (BLM) and a second representative from Regional Fishery Management Councils or Marine Fisheries Commissions. The bill also directs the two Tribal representatives to be split—one from Alaska and one from another state. Further, H.R. 8811 would shorten the timeline for the Board to recommend, and for the Secretary to approve, projects, giving local partners more timely decisions on their requests and the funds for approved projects. H.R. 8811 would also change the reporting frequency to Congress on partnership structures to only be required in years in which a partnership is proposed to be added or removed, while making technical changes to the separate report required every five years. Additionally, technical changes are made to the section on federal cost-

sharing and the BLM is added to the agencies authorized to provide technical and scientific assistance. Finally, H.R. 8811 would authorize funding to be made available to both projects and the Fish Habitat Partnerships themselves.

NFHP consists of a network of 20 regional Fish Habitat Partnerships that coordinate federal, state, Tribal, non-profit, and private efforts to maximize efficiency and impacts for fish habitat conservation. The Service helps implement NFHP by providing technical assistance and allocating congressionally appropriated funding to eligible Fish Habitat Partnerships. Since 2006, NFHP has provided over $320 million to over 1,300 projects in all 50 states. Service biologists and partners work on projects in priority areas to restore stream banks, remove man-made barriers to fish passage, reduce erosion from farm and ranchlands, and conduct studies to identify conservation needs for fish and their habitats. NFHP projects help to provide more robust fish populations, better fishing, and healthier and more resilient waterways.

Reauthorizing NFHP is critical to ensuring fish and their habitats are conserved and managed for the enjoyment of all into the future. The Service believes that the changes made by H.R. 8811 to NFHP would improve access, efficient operations, and transparency of the program. In addition to the welcomed changes, we would appreciate the opportunity to work with the sponsor and this Subcommittee on an additional change to better improve the Service delivery of NFHP across the Nation. Section 205 of the ACE Act, in subsection (e), paragraph 3, provides a special rule to Tribes that allows an exemption to the required 1:1 federal cost-share. The Service recommends extending that special rule to Native Hawaiian Organizations. Doing so would increase access and allow the Service, through NFHP, to improve engagement in Hawaii and the Pacific Islands, while benefiting fish species and communities that call that region home.

Discussion Draft of H.R. ____, ESA Amendments Act of 2024

The discussion draft of the ESA Amendments Act of 2024 would amend multiple provisions of the ESA and would establish additional processes for the Service, other federal agencies, and partners. While the Department and the Service prefer to testify on bills after they have been introduced, we offer the following brief comments on this discussion draft and would like to preserve the opportunity to submit additional input on the language after it is introduced, if necessary.

At a time in which we face an unprecedented extinction crisis due to the growing and synergistic effects of habitat loss and fragmentation, climate change, invasive species, disease, unlawful wildlife trade, and other stressors, the discussion draft would do little to improve conservation outcomes. Rather, the discussion draft would reverse regulatory improvements promulgated by this Administration; add process, mandatory duties, and statutory deadlines to our already under-resourced staff, with a commensurate increase in litigation risks and costs; reduce opportunities for public engagement; and increase the complexity and costs of administering the ESA at a time when the Service already lacks sufficient funding. The Service has concerns with each title of the discussion draft. Some of these concerns were discussed in our March 6, 2024, testimony to this Subcommittee on Sections 401,402, and 601 of H.R. 7408, America's Wildlife Habitat Conservation Act. The Service strongly opposes the discussion draft as currently written. We are available to outline our concerns and provide specific feedback through the technical assistance process, but believe that it is imperative to properly resource and fund our obligations to protect America's wildlife heritage.

H.R. 8308, Nutria Eradication and Control Reauthorization Act of 2024

H.R. 8308 would reauthorize the Nutria Eradication and Control Act of 2003 (Act) through FY 2030. Last reauthorized in 2020, the Act authorizes the Secretary of the Interior to provide financial assistance to states to implement nutria eradication and control measures and restore marshlands, wetlands, and agricultural lands damaged by nutria. The Service supports H.R. 8303, which, if funded, would enhance our ability to work with state partners to combat invasive nutria populations that threaten vital ecosystems.

Originally from South America, nutria are large aquatic rodents that cause extensive damage to wetlands, agricultural lands, and water infrastructure. Their burrowing and feeding habits destroy native vegetation, erode riverbanks, and undermine levees and other flood control structures, damaging wildlife habitat and leading to increased flooding risks and costly repairs. Since their introduction in the United States, nutria have been found in at least 20 states, with sizable populations established along the Gulf Coast, in the mid-Atlantic, and in the Pacific Northwest. Small breeding populations have also recently been established in Virginia and California.

The Service is dedicated to supporting nutria eradication and control efforts and restoring nutria-damaged habitats on public and private lands. We take a collaborative approach to these efforts, working across many Service programs and in partnership with other federal and state agencies, private landowners, and non-governmental organizations. For instance, the National Wildlife Refuge System has two Invasive Species Strike Teams (ISST) dedicated to nutria control and eradication, with ISST funding supporting the efforts of Service staff and state agencies to control nutria on and adjacent to national wildlife refuges. The Service's Partners for Fish and Wildlife program has dedicated private lands biologists and agreements with state and private partners to combat the spread of nutria and restore nutria-damaged habitats on private lands. In addition, the Service's Fish and Aquatic Conservation Program has contributed funding to the States of California and Maryland to support management actions through Aquatic Nuisance Species Task Force-approved state management plans.

These investments have led to many successes in recent years. In 2022, a team composed of the federal, state, university, and private partners successfully eradicated nutria from the Delmarva Peninsula—a milestone achieved after 20 years of eradication work and coordination with over 700 landowners. This effort protected over 250,000 acres of critical marshlands that support a variety of wildlife and provide storm resilience. Although complete eradication may not be possible along the Gulf Coast, the Service is supporting the development of strategic eradication plans for islands in the Mississippi River Delta, including at Breton National Wildlife Refuge. In California, our joint nutria eradication efforts with the state show promise—we are optimistic about complete eradication within 5–10 years.

Sustained federal funding to support coordinated nutria eradication, control, and habitat restoration efforts on federal, state, and private lands is essential to mitigating the damaging effects of this invasive species on wildlife and communities. If funded, H.R. 8303 would enable the Service to provide more funding to states for their work to control and eradicate nutria and facilitate the development of new technologies and strategies to enhance eradication efficiency and cost-effectiveness. This would significantly expand the Service's capacity to support our state partners' efforts, ultimately helping to preserve biodiversity, protect agricultural productivity, and safeguard water management systems.

Conclusion

The Service appreciates the opportunity to testify before the Subcommittee on H.R. 8811, To reauthorize the America's Conservation Enhancement Act, and for other purposes and H.R. 8308, Nutria Eradication and Control Reauthorization Act of 2024. The Service supports both bills and would welcome the opportunity to work with the sponsors and Subcommittee on technical amendments to the legislation. While the Department does not typically testify on legislation before it is introduced, we provided our brief comments on the discussion draft of H.R. , ESA Amendments Act of 2024, due to the impacts the draft legislation would have on the ESA, and would be available to provide feedback through the technical assistance process. The Service strongly opposes the discussion draft as currently written, but would like to preserve the opportunity to submit additional input on the bill after it is introduced, if necessary.

QUESTIONS SUBMITTED FOR THE RECORD TO MR. STEPHEN GUERTIN, DEPUTY DIRECTOR FOR PROGRAM MANAGEMENT AND POLICY, U.S. FISH AND WILDLIFE SERVICE

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

Questions Submitted by Representative Newhouse

Question 1. Provide details on the timeline of relocation of Grizzly bears into the North Cascades Ecosystem.

Question 2. How much money does the service annually spend on litigation in relation to the ESA?

Question 3. How much money does Defenders of Wildlife receive from the service in grants or through other programs?

3a) In addition, what are the parameters on these funds and how they are used?

Question 4. On average, how long does it take the Secretary to approve Candidate Conservation Agreements with Assurances?

Mr. BENTZ. I now recognize Dr. Steed for 5 minutes.

STATEMENT OF BRIAN STEED, GREAT SALT LAKE COMMISSIONER, OFFICE OF THE GREAT SALT LAKE COMMISSIONER, SALT LAKE CITY, UTAH

Dr. STEED. Mr. Chairman, members of the Committee, it is an honor to appear before you today to testify in support of H.R. 7544. I appreciate the work of Representative Maloy and her co-sponsors in this important legislative effort.

For the balance of my career, I have had the opportunity to research and work in the natural resources policy arena. I have had the honor to serve in leadership roles in large Federal and state natural resource agencies, including time serving as Deputy Director of Policy and Programs and serving as the official exercising the authority of the Director in the U.S. Bureau of Land Management here in Washington, DC. I have also worked as the Executive Director of the Utah Department of Natural Resources, overseeing eight state agencies ranging from water resources and water rights to wildlife and state parks. These experiences, in addition to my current role working on resource issues in the Great Salt Lake, have shown me firsthand the delicate relationship between state and Federal actors in the natural resources space, especially when related to water.

Since European settlement, the U.S. Government has controlled much of the land mass in the western United States. This includes over half of Utah, where approximately 63 percent of the state is managed by the Bureau of Land Management, the U.S. Forest Service, and various other Federal agencies. With so much land in the Federal estate, Federal permits have an outsized influence on economic activities throughout the West. It is no exaggeration to say that Federal decisions on permits can make or break small businesses, family agricultural operations, communities, and regional economies.

Water, in contrast, has never been considered to be part of a Federal jurisdiction. Water governance in the West has long been deemed to be a feature of state law, where states make the decision regarding distribution and allocation of this critical resource. In some of the driest areas of the nation, state decisions on water have become the backbone of economic growth, as well as conservation activities throughout the region.

While the states' jurisdictional authority is long settled in the West, there have been instances where the Federal Government has crept in on that jurisdiction. In a number of these cases, the Federal Government has tried to condition the granting of permit to the transferring of water to Federal agencies, and that has caused enormous concern throughout the West.

In November 2011 and early 2012, for instance, the U.S. Forest Service issued directives that would have effectively required ski resorts operating under special use permits on forest lands to transfer their water rights to the Federal Government. These rules

further asserted that, by agreeing to the terms of the special use permit, the ski resorts waived any claim against the United States for compensation for these water rights. Predictably, this effort resulted in huge consternation from ski area operators who had invested millions of dollars in obtaining and perfecting water rights under state law.

The National Ski Areas Association eventually sued and prevailed in U.S. District Court in 2012, resulting in the Forest Service dropping the proposed rules. Similar concerns arose in 2014, when the U.S. Forest Service promulgated a separate rule focusing on "Forest Service projects and authorizations potentially affecting groundwater resources." From the Federal Register welcoming comment on this proposal, the Forest Service stated that the proposed changes included "new policies and procedures for both water resources management and special use authorizations that involve access to or utilization of groundwater resources on National Forest Service lands."

These draft rules were again withdrawn in 2015 after a major outcry from state governors, oil and gas operators, ranchers, and others that rely on state-allocated rights to groundwater for economic activities on public lands.

Finally, ranchers across the West have faced the perennial concern that these types of requirements are creeping into stock watering rights during the issuance or renewal of grazing permits. Disputes over such rights in 2007 led the Idaho Supreme Court to determine that Federal land agencies cannot perfect stock watering rights because Federal agencies do not own the stock and can therefore not prove a beneficial use for the water.

Since that time, Idaho ranchers complained that they have been regularly pressured to enter "agency agreements" with Federal Government, asserting that the ranchers act as agents of the Federal Government in exercising their stock watering. In Utah, we have heard various reports of similar behaviors. Just yesterday, I learned of a rancher in southern Utah who was pressured into granting the Bureau of Land Management co-ownership of his well water rights as a condition of permitting of the drilling of that well.

Reports like these have led the Utah State Legislature to legally forbid Federal land agencies from being considered beneficial users or beneficial owners of stock water. And much like the legislation before us today, Utah State law prohibits Federal public land agencies from conditioning the issuance or renewal of a permit on the transfer of water to a Federal agency, or from insisting that the water user acquire a water right in the name of that public land agency.

Based on the foregoing, H.R. 7544 brings necessary clarity to Federal lands and water rights. It codifies what should be normal practice within Federal agencies. It is good, common-sense legislation that should be favorably considered by this body.

Thank you so much for the opportunity to appear before you again today, and I am happy to answer any questions you might have. Thanks.

[The prepared statement of Dr. Steed follows:]

PREPARED STATEMENT OF BRIAN C. STEED, JD, PHD, GREAT SALT LAKE COMMISSIONER, STATE OF UTAH; AND EXECUTIVE DIRECTOR, JANET QUINNEY LAWSON INSTITUTE FOR LAND, WATER & AIR, UTAH STATE UNIVERSITY

ON H.R. 7544

Chair and Members of the Committee:

It is an honor to appear before you today to testify in support of H.R. 7544 prohibiting "the conditioning of any permit, lease, or other use agreement on the transfer of any water right to the United States by the Secretary of Interior or the Secretary of Agriculture."[1] I appreciate the work of Representative Maloy and her co-sponsors in this important legislative effort.

I have had the opportunity to research and work in the natural resource policy area throughout my career. I have also had the honor to serve in leadership roles in large federal and state natural resource agencies, including time serving as the Deputy Director of Policy and Programs, and serving as the Official Exercising the Authority of the Director in the U.S. Bureau of Land Management here in Washington DC. After my time in DC, I worked as the Executive Director of the Utah Department of Natural Resources, where I oversaw eight state agencies ranging from water resources and water rights to wildlife and state parks. These roles, in addition to my current role working on resource issues on the Great Salt Lake and throughout Utah, have shown me first-hand the delicate relationship between state and federal actors in the natural resource space, especially when related to water.

Since European settlement, and continuing past statehood to the present, the U.S. Government has controlled much of the landmass in the Western U.S. This includes over half of Utah, where according to the Congressional Research Service, 63.1 percent of the state is managed by the U.S. Bureau of Land Management, the U.S. Forest Service, and various other federal agencies.[2] With so much land in the federal estate, federal permits have an outsized influence on economic activities throughout the West. It is no exaggeration to say that federal decisions on permits can make or break small businesses, family agricultural operations, communities, and regional economies.

Water, in contrast, has never been considered to be under federal jurisdiction. Water governance in the West, including Utah, has long been deemed to be a feature of state law where the state makes decisions regarding distribution and allocation. In some of the driest areas in the nation, state decisions on water are hugely important and have become the backbone of conservation as well as economic growth and opportunity within the states.

While the states' jurisdictional authority on water is long settled in the West, there have been a number of instances where the federal governmental agencies have crept in on that jurisdiction by attempting to condition permits on either the transfer to or co-ownership with the federal government for water rights. Such instances have caused enormous concern.

In November of 2011 and in Jan. of 2012, for instance, the U.S. Forest Service issued directives that would have effectively required ski resorts operating under a special use permit on forest lands to require co-ownership of their water rights with the United States or facilitate the outright transfer of those rights to the United States.[3] These rules further asserted that the ski resorts would waive any claim against the United States for compensation for those water rights. Predictably, this effort resulted in huge consternation from ski area operators who had invested millions of dollars in obtaining and perfecting water rights under state law. The National Ski Areas Association sued and eventually prevailed in U.S. District Court in 2012.[4] Based, in part, on that defeat in court, the Forest Service gave up on the plan to require transfer of water and worked on new rules that recognized the rights of ski areas to hold water rights pursuant to state authority.

Similar concerns arose in 2014, when the U.S. Forest Service promulgated its Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560 focusing on "Forest Service projects and authorizations potentially affecting groundwater resources" which contemplated "new policies and procedures for both water resources management and special use authorizations that involve access to

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[1] H.R. 7544

[2] Congressional Research Service (Updated February 21, 2020) "Federal Land Ownership: Overview and Data."

[3] Forest Service Interim Directive 2709.11-2011-3, which was soon replaced with Interim Directive Number 2709.11-2012-2

[4] Nat'l Ski Areas Ass'n, Inc v. U.S. Forest Serv. 910 F. Supp 2d 1269 (D. Colo. 2012)

or utilization of groundwater resources on [National Forest Service] lands."[5] These draft rules were withdrawn in 2015 after major outcry from state governors, oil and gas operators, ranchers, and others that rely on state allocated right to groundwater. Major concerns included the Forest Service's seeming presumption that it should extend its authority to the allocation of groundwater resources, something that had historically been the exclusive jurisdiction of the states. Many others were concerned that the proposed rule treated ground and surface water as connected—a presumption not held by many Western States water law.

Finally, ranchers across the West have faced the perennial concern that these types of requirements are creeping into water rights for stock watering during issuance or renewal of grazing permits. Dispute over stock watering rights in 2007 led the Idaho Supreme Court to determine that federal land agencies cannot perfect stock watering rights on the logic that the ranchers own the stock and therefore are the only ones capable of demonstrating beneficial use for the underlying water right.[6] This ruling was also codified into Idaho State Code.[7] Since that time, Idaho ranchers complain that they have been pressured to enter "agency agreements" with the federal government to assert that the ranchers are acting as agents of the federal government in exercising their stock watering.[8]

The anxiety that federal agencies are pressuring ranchers to surrender stock watering rights led the Utah State Legislature to pass legislation specifying that a federal public land agency may not be considered a beneficial user of stock water unless the agency itself owns stock.[9] The Utah State law further prohibits federal public land agencies from conditioning the issuance or renewal of a permit on the transfer of water to a federal agency or requiring the water user to apply for or acquire a water right in the name of the public land agency.

Based on the foregoing, Representative Maloy's legislation brings necessary clarity to the rights and responsibilities in the relationship between federal lands and water rights. Importantly, it codifies what should be common practice within federal agencies when it comes to acquiring water rights. Moreover, it provides specific exemptions for already acknowledged water right policies regarding federal lands and agencies.[10] It is good, common-sense legislation that should be favorably considered by this body.

I am happy to answer any questions you may have.

Mr. BENTZ. Thank you. I now recognize Dr. Havens for 5 minutes.

STATEMENT OF KIRK HAVENS, DIRECTOR OF THE CENTER FOR COASTAL RESOURCES MANAGEMENT, VIRGINIA INSTITUTE OF MARINE SCIENCE, GLOUCESTER POINT, VIRGINIA

Dr. HAVENS. Chairman Bentz, Ranking Member Huffman, Congressman Wittman, and distinguished members of the Subcommittee, thank you for the opportunity to speak with you today.

My name is Kirk Havens. I am a Professor of Marine Science and the Director of the Center for Coastal Resources Management at the Virginia Institute of Marine Science at William and Mary. I have served as the Virginia gubernatorial appointee to the independent Chesapeake Bay Scientific and Technical Advisory

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[5] Federal Register (05/06/2014) "Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560"

[6] Joyce Livestock Company v. United States of America, 156 P.3d 502 (Idaho 2007)

[7] Idaho State Code 42-501

[8] Shawn Ellis, Idaho Farm Bureau (July 23, 2023) "Idaho Farm Bureau Cautions Ranchers Against Signing 'Voluntary Agreements'"

[9] Utah State Code 73-3-31

[10] Exemptions listed in the draft legislation include water rights for the purposes of U.S. Bureau of Reclamation contracts, Federal Reserved Water Rights, Federal Power Act Rights, and Indian Water Rights. The draft legislation further specifies that this bill does not impact Federal Water Rights acquired under state law and clarifies that it does not impact Endangered Species Act or Interstate Compact water allocations.

Committee, known as STAC, for five governors, and have served as the Committee's Vice Chair and Chair.

The Chesapeake Bay restoration effort to improve the health of the Bay's waterways in the largest estuary in the United States on the doorstep of the capital of the largest economy on the planet is considered a model for similar efforts worldwide. Reauthorization of the American Conservation Enhancement Act helps ensure that that partnership effort has the appropriate resources for its critical work.

After 40 years of effort, reflecting on our expectations and the ability to meet them is critical for the continued wise investment of resources. In the STAC consensus report titled, "Achieving Water Quality Goals in the Chesapeake Bay: A Comprehensive Evaluation of System Response," or CESR, for short, the 60 contributors explained that water quality investments have led to improvements in living resources and can continue to do so, even with the headwinds of significant population growth, development, agricultural intensification, and climate change. However, these things challenge our rate of progress, so we need to improve our effectiveness so that we make things better in areas where people need it most, especially those in under-represented communities who may not have had much attention before.

Let's talk about our investments in water quality and how we can make them even better by improving the return on our investments while we support the complete suite of Bay restoration goals. The CESR report highlights three key strategies to achieve this. First, instead of just tracking levels of nitrogen, phosphorus, and dissolved oxygen, we should zero in on what really matters to people: the health and abundance of living creatures in the Bay. Next, we need to prioritize areas that can provide the biggest boost to living resources, like focusing on shallow waters that are crucial to many species. Third, we should narrow down our efforts so we can clearly see and measure the benefits, instead of spreading our efforts randomly across the watershed's entire 64,000 square miles. Let's concentrate where it counts the most. By shifting our focus to these strategies, we can achieve better results.

It is important to note that our remaining challenge is to focus on the largest, manageable sources of nutrients to the Bay: agricultural and urban non-point source pollution. We need to find better ways to encourage people to reduce pollution. Instead of just focusing on how many recommended practices they implement, we should reward them for actually making a difference in reducing pollution. This will require coming up with new ideas for performance incentives and creating opportunities to experiment with non-standard practices.

To help do this, we should talk to a broad range of stakeholders to figure out what we should be working on and how to do it fairly. This includes the Tribal Nations that have called the Bay watershed home for thousands of years, and who have acted as stewards of the Bay for centuries. They have much to teach regarding their stewardship efforts and much to gain as their cultural practices and economic well-being are tied to the health of the Bay.

We want to make sure everyone supports the Bay program's plans. By doing this, we can make sure that our efforts to clean up

the water and restore the Bay's health are focused on the places that matter most to people like the rivers, streams, wetlands, and shores.

Finally, it is important to understand that we need to keep adapting our plans as we learn more and as things change. Restoring the Bay is a complicated task, and we need to be flexible and keep improving our strategies as we go along. There are ways to make smart decisions on what we know, even with limited resources and in the face of uncertainties and decision making. The upcoming period provides an opportunity to rethink how we define success in restoring the Bay, moving beyond pollution reduction targets to broader ecological, cultural, and community outcomes. The reauthorization of the ACE Act is critical to that success.

To close, I would like to add that the Virginia Institute of Marine Science has written the Virginia State Code to provide independent scientific advice on marine and coastal resource issues. We are available to meet with the Committee members and your staff, should you like more detail. I truly appreciate the Committee's attention to this important issue, and I am happy to answer any questions. Thank you for the privilege of your time.

[The prepared statement of Dr. Havens follows:]

PREPARED STATEMENT OF KIRK HAVENS, PH.D., DIRECTOR OF THE CENTER FOR COASTAL RESOURCES MANAGEMENT, VIRGINIA INSTITUTE OF MARINE SCIENCE, WILLIAM & MARY

ON H.R. 8811

Thank you Chairman Bentz, Ranking Member Huffman, Congressman Wittman, and distinguished Members of the Subcommittee for the very important work you do and the opportunity to speak today. My name is Kirk Havens. I am a professor of marine science and Director of the Center for Coastal Resources Management at the Virginia Institute of Marine Science, William & Mary. I have served as the Virginia gubernatorial appointee to the independent Chesapeake Bay Scientific and Technical Advisory Committee, known as STAC, for five Governors and have served as the Committee's Vice Chair and Chair.

It is an honor to testify about the 40-year effort to restore the Chesapeake Bay, one of the largest environmental projects in the United States. A healthy Chesapeake Bay supports diverse living organisms, provides recreational opportunities, and enhances community resilience, quality of life, and the economy for the 64,000 square miles that drain into it. A recent scientific report indicates that we have reached a pivotal point where we can apply our decades of learning for further advancement. The Chesapeake Bay restoration effort to improve the health of the Bay's waterways is considered a model for similar efforts worldwide and reauthorization of the America's Conservation Enhancement Act helps ensure that this partnership effort has the appropriate resources for its critical work.

Despite challenges like growing populations, land use changes, and climate issues, significant progress has been made. While there's still more work to do to fully meet the goals set by the Chesapeake Bay Program, the advancements thus far, and the lessons we continue to learn, are clear opportunities for accelerating our progress even in the face of uncertainties such as climate change.

The independent Chesapeake Bay Scientific and Technical Advisory Committee conducted a comprehensive study titled "Achieving Water Quality Goals in the Chesapeake Bay: A Comprehensive Evaluation of System Response (CESR)" (additional information also can be found in this video)." The CESR report, with 60 contributors, synthesized 40 years of scientific and management effort and provides great insight on how the Bay's ecosystem has responded to these efforts, lessons we have learned over the decades, and offers opportunities for accelerating our progress.

Key Findings

The CESR report found the following themes as a result of our research:

1. **Nonpoint Source Pollution:** Current programs aimed at reducing pollution from nonpoint sources, such as agricultural runoff, are not generating sufficient reductions to meet water quality goals.
2. **Slow System Response:** Changes in the Bay's water quality are occurring more slowly than expected, making it clear that achieving the goals will remain in the future.
3. **Management Innovations:** New water quality management strategies, along with improved stewardship of nearshore habitats, could open opportunities for improved living resources in the Bay.
4. **Learning and Adaptation:** Adopting a "learning while doing" approach can help refine pollution reduction efforts and accelerate improvements in the Bay's living resources.

Current Efforts and Challenges

While we have made significant progress in light of major headwinds, we need to accelerate that progress and improve our effectiveness. Despite significant reductions in point source pollution, particularly from wastewater treatment, the focus now needs to shift to the largest manageable sources of nutrient pollution: agriculture and urban areas. New technologies and methods for controlling pollutants can reduce nitrogen, phosphorus, and sediment inputs into the Bay, thereby diminishing algae growth and sedimentation and improving oxygen levels and water clarity, which are crucial for the Bay's ecosystems. However, implementing them will require significant change in existing policies and programs.

Opportunities

There are several opportunities to address these gaps, including:

1. **Address areas where pollutants continue to be stored in increasing amounts.** Some areas input more nutrients than are exported in products, resulting in stockpiled nutrients in soil. Solutions must reduce inputs, increase products, or move nutrients to areas that are lacking.
2. **Targeted Pollution Reduction.** Instead of spreading efforts randomly over 64,000 square miles, accelerate the adoption of practices that effectively reduce nutrient pollution in high-priority areas. Detailed monitoring and refined models can help identify these pollution hotspots and tailor treatment efforts more effectively.
3. **Pay-for-Performance Programs.** Encourage land managers to implement practices that directly reduce pollution, through financial incentives based on measurable outcomes, thereby greatly enhancing program effectiveness.
4. **Change Focus.** Instead of just looking at levels of nitrogen, phosphorus, and dissolved oxygen, focus on what people really care about: the health and number of living creatures. We should be focused on targeting water quality investments on areas that could give the biggest boost to living resources, like shallow waters that are very important for most species. In addition to improving water quality, it will be important to manage habitats to make the most of these water quality investments.
5. **Adaptive Management.** The Bay and its watershed are changing in ways that make the future difficult to predict. The ability to learn and adapt will be critical to our success as we make decisions in an uncertain world. Localized successes, such as increased dissolved oxygen levels in certain habitats, indicate that progress is possible if we can scale proven solutions. To paraphrase Chesapeake Research Consortium Executive Director Denice Wardrop: Not meeting the goal isn't the issue. The real problem would be if we didn't learn how to improve. Success lies in continuing to learn how to do it better.

Conclusion

The effort to restore the Chesapeake Bay is complex and ongoing. While significant progress has been made, there is still much to do. By shifting our focus to the health and abundance of living resources, targeting key areas for intervention that provide the greatest living resources return, and adopting a "learning while doing"

approach, we can make more effective use of our resources and achieve greater improvements in the Bay's health.

As we move forward, it is crucial to engage a broad range of stakeholders in defining goals and strategies. We need to redouble our efforts to be inclusive and bring in Tribal voices who have been involved in the stewardship of the Bay for centuries. The upcoming period provides an opportunity to rethink how we define success in restoring the Bay, moving beyond pollution reduction targets to broader ecological, cultural, and community outcomes. The reauthorization of the America's Conservation Enhancement Act is critical to that success.

The Virginia Institute of Marine Science is written into Virginia State Code as the independent scientific advisor to the Commonwealth on marine and coastal issues. We would be happy to meet with Committee members and their staff should you have questions. I truly appreciate the Committee's attention to this important issue and am happy to answer any questions.

Mr. BENTZ. Thank you. I now recognize Ms. Richmond for 5 minutes.

STATEMENT OF ELLEN RICHMOND, SENIOR ATTORNEY, DEFENDERS OF WILDLIFE, WASHINGTON, DC

Ms. RICHMOND. Good afternoon, Chairman Bentz, Ranking Member Huffman, members of the Subcommittee. My name is Ellen Medlin Richmond, and I am a Senior Attorney with Defenders of Wildlife.

Defenders is a national, non-profit conservation organization dedicated to the protection of all native animals and plants and their natural communities. We represent nearly 2.1 million members and supporters throughout the United States. Thank you for inviting me here today to speak about the importance of the Endangered Species Act to conserving imperiled wildlife. I have dedicated my career to advocating for clients, including wildlife that wouldn't otherwise have a voice in the courts and before agencies and policymakers.

Before I discuss the legislation before us today, it is important to first recognize that we are in the midst of a catastrophic biodiversity crisis. We are losing species faster than ever before in human history. Approximately 1 million species worldwide are facing extinction, and in the United States one in every three species is at risk. Failing to respond to this crisis is not an option. Biodiversity is key to human well-being. Healthy, diverse wildlife and habitats pollinate crops, sequester carbon, keep our waterways clean, and even buffer humans from diseases like Lyme and malaria.

Unless we can arrest and reverse extinction trends, we will continue to see biodiversity lost and experience the fallout of nature's collapse: more frequent pandemics, a hotter planet, and deteriorating human welfare. Our actions now will determine whether our planet will sustain our priceless natural legacy for generations to come.

The ESA is the cornerstone of wildlife protection in the United States. Since its enactment more than 50 years ago, the ESA has been remarkably effective at protecting our nation's biodiversity. Almost every listed species is still with us today, and hundreds are on the path of recovery. Any changes to the ESA must be judged by whether they stave off extinction and promote long-term, lasting species recovery.

Representative Westerman's bill does the opposite by eviscerating the ESA and making it harder, maybe impossible, to address the alarming extinction trends among our nation's wildlife. This bill would damage the ESA and hurt wildlife in so many ways that I can't name them all in 5 minutes, but I will highlight just three of the most damaging provisions in my remarks today.

First, under this bill, species nearing the point of no return would have to wait even longer to gain the critical and highly effective protections of the Endangered Species Act, but they would lose those protections much more quickly. This bill would extend the deadline for placing species on the ESA list, which is a precondition of ESA protection, from 1 year to as many as 12 years. And meanwhile, delistings would go on a fast track.

Second, the bill takes a sledgehammer to ESA protections for threatened species, and these include some of our most iconic wildlife, such as the Florida manatee. Threatened species, by definition, are at an inflection point. They are not yet in danger of extinction, but they are likely to become so in the foreseeable future if nothing is done to reverse their trajectory. We should be proactively recovering these species, not pushing them closer to the brink. But that is what this bill would do. It would allow much more taking of threatened species, which is an ESA term of art that refers to killing, injuring, harassing species.

Third, this bill would strip away protections for species' critical habitat. The ESA protects that habitat because every species needs a place to live. Species can't survive and recover if they have nowhere to go. Yet, this bill would create a Byzantine new system for carving out various kinds of land from critical habitat based on complicated new criteria. Even setting aside the damage these carve-outs could do to habitat conservation, they would be near impossible for the wildlife agencies to apply.

At this critical moment for the biological health of our planet, the United States must double down on its commitment to conserving imperiled species and their habitats and preventing extinction. We shouldn't be gutting the laws that protect them. Regrettably, that is what Representative Westerman's proposed legislation would do. We can and we must do better. We are the stewards of our irreplaceable natural heritage. Our children and their children deserve to inherit a healthy, vibrant environment replete with wildlife for all to enjoy.

Thank you for the opportunity to testify today. I would be happy to answer any questions.

[The prepared statement of Ms. Richmond follows:]

PREPARED STATEMENT OF ELLEN MEDLIN RICHMOND, SENIOR ATTORNEY, DEFENDERS OF WILDLIFE

ON H.R. ____, "ESA AMENDMENTS ACT OF 2024"

Chairman Bentz, Ranking Member Huffman, and Members of the Subcommittee: My name is Ellen Medlin Richmond and I am a Senior Attorney with Defenders of Wildlife, a national non-profit conservation organization dedicated to the protection of all native animals and plants in their natural communities. For over 75 years, Defenders of Wildlife has protected and restored imperiled species throughout North America by establishing on the ground programs at the state and local level; securing and improving state, national, and international policies that protect species and their habitats; and upholding legal safeguards for native wildlife in the

courts. Defenders recently launched its Biodiversity Law Center and Center for Conservation Innovation to pioneer proactive and pragmatic solutions to enhance the effectiveness of endangered species conservation in the United States. We represent nearly 2.1 million members and supporters throughout the United States.

I have dedicated my career to advocacy for clients—including wildlife that would not otherwise have a voice—in the courts and before federal and state agencies and policymakers. In my current role as a senior attorney at Defenders of Wildlife, I specialize in litigation and policy analysis under the Endangered Species Act (ESA) and ESA regulations. Most recently, I was a leader of Defenders' advocacy surrounding the 2024 revisions to the ESA regulations. I have also worked on a variety of ESA litigation, including litigation aimed at protecting iconic western species such as the lynx, gray wolf, and Mojave desert tortoise, as well as beautiful coastal animals such as the red knot, piping plover, and manatee. Before coming to Defenders of Wildlife, I worked both in private practice, including at the Los Angeles-based law firm Munger, Tolles & Olson, and in the nonprofit sector, at the Sierra Club Environmental Law Program. I began my career as a law clerk for the Honorable Raymond C. Fisher of the U.S. Court of Appeals for the Ninth Circuit, and before that graduated from Stanford with a J.D. and an M.S. in environmental policy. Thank you for inviting me here today to speak about the ESA Amendments Act of 2024.

As I will describe in my testimony, we are facing an alarming and catastrophic worldwide biodiversity crisis, largely driven by humankind. Development, habitat loss, exploitation, pollution, and invasive species now threaten as many as one million species with extinction. These threats are exacerbated by climate change, which is increasingly impacting our planet. To combat these environmental crises, we need to take bold action. This includes fully funding and strengthening the ESA, the visionary law that establishes the nation's commitment to conserving and recovering imperiled species.

The bill before the Subcommittee, the "Endangered Species Act Amendments of 2024," would unfortunately take us in the wrong direction at this critical moment for our planet.

Responding to a Biodiversity Crisis of Epic Proportions

The science marshalled over the past few years unequivocally illuminates with stark clarity that this is a pivotal time for wildlife and ultimately, humanity. In 2019, the United Nations Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services released a groundbreaking assessment warning that about one million species are now threatened with extinction.[1] In North America alone, nearly 3 billion birds have disappeared since 1970.[2] Many once-common species have drastically declined, including monarch butterflies and bumblebees, and more than 10 species in the continental United States have been declared extinct in the past decade. This loss of species is driven by the fact that we have altered over 75% of terrestrial environments and 66% of marine environments.[3]

Furthermore, we are losing species faster than ever before in human history, at tens to hundreds of times faster than the normal background extinction rate. Just last year, the U.S. Fish and Wildlife Service delisted 21 U.S. species because they were extinct, a sobering reminder that extinction is possible, and that a strong Endangered Species Act is required to prevent it.[4] These delistings do not show that the ESA failed to prevent extinction, but instead highlight how critical ESA protections are for species teetering on the edge, as the majority of those 21 species were listed too late to benefit from the ESA's protections. When species are listed in time, the ESA works.

The loss of each species weakens the nation's capacity for a strong economy, flourishing human health, national security, and resistance to national disasters, each of which is built upon the foundation of the ecosystem services they provide. Plant and animal species can even offer the potential for lifesaving medicines: As just one of many examples, chemical compounds found in the venom of the rare and

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[1] Diaz, S., J. Settele, E. S. Brondizio, et al. 2019. *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*. Available at: https://www.ipbes.net/news/Media-Release-Global-Assessment.

[2] Rosenberg, L. V. et al. 2019. "Decline of the North American avifauna." Science 366 (6461): 120-124.

[3] Diaz et al 2019.

[4] U.S. Fish and Wildlife Service, 21 Species Delisted from the Endangered Species Act due to Extinction, Oct. 16, 2023, https://www.fws.gov/press-release/2023-10/21-species-delisted-endangered-species-act-due-extinction#:~:text=%E2%80%94%20The%20U.S.%20Fish%20and%20Wildlife,species%20protected%20under%20the%20ESA.

protected Gila monster lizard[5] of the American southwest inspired scientists to create the diabetes and weight loss drugs Ozempic and Wegovy.[6]

From the more than five trillion dollars provided by ecosystem services in the United States[7] to forming the backbone of American agriculture[8] in the U.S., nature is inherently important and has a critical role to play in human flourishing. Each species has a critical role, and ours may be the most critical of all: we must be the proactive stewards of all wildlife and their habitats to ensure their persistence as well as our own.

This unprecedented challenge presents an historic moment for conservation and our country—perhaps the most critical one we have ever faced. Our actions now will determine if our planet will sustain our priceless natural legacy—our rich abundance of wildlife and awe-inspiring landscapes—for current and future generations. If we do not act now, the consequences to our society from the loss of species and ecosystem services will be dire.

The Endangered Species Act

Our national commitment to saving wildlife must start with a strong and fully funded ESA. Enacted more than 50 years ago, the ESA established a visionary strategic commitment to preserve and maintain our nation's biological heritage. The ESA is our flagship law for protecting wildlife and plants from extinction and the cornerstone of our commitment to preserving life on Earth. This landmark law has been remarkably effective at protecting our nation's biodiversity: almost every listed species is still with us today and hundreds are on the path of recovery.

The most important thing Congress can do to improve the ESA's effectiveness is to fully fund it. Although Defenders of Wildlife and others work constantly to improve implementation of the Act, the statutory framework established by the ESA—identifying imperiled species, protecting them and their critical habitat from further harm, and mandating recovery plans to restore them from the edge of extinction—is as sound today as it was in 1973. For this visionary framework to work as Congress originally intended, however, the agencies charged with overseeing and implementing it must have the political will and necessary resources to achieve its visionary purposes and goals.

The Endangered Species Act Amendments of 2024

The bill before the Subcommittee today would significantly undermine the ability, or render it impossible in some instances, for the ESA to conserve imperiled species. At a time when we should be redoubling our commitment to protect biodiversity and stop extinction, the bill would undermine key provisions of the ESA and result in significant harm to at-risk species and their habitats, further exacerbating the environmental challenges we are facing today.

There are numerous provisions in the bill that would weaken the ESA and lead to significantly decreased protections for imperiled species, ultimately condemning them to continued slow decline. It would drastically rewrite key portions of the ESA to prioritize politics over science and inappropriately shift responsibility from the federal government to the states, many of which do not have sufficient resources or legal mechanisms in place to take the lead in conserving listed species. It would place significant new administrative burdens on already over-burdened agencies. It would turn the current process for listing and recovering threatened and endangered species into a far lengthier process that precludes judicial review of key decisions.

For the remainder of my testimony, I will discuss some of the more significant provisions in more detail.

Under This Bill, Species Listings Could Move at a Crawl, While Delistings Would Be Fast-Tracked [Sections 101, 302, and 303]

At the heart of the ESA are the listing provisions of section 4, which requires the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the "Services") to determine whether a species is threatened or endangered. Section 4 listing determinations bring those species under the protections of the Act.

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[5] https://www.nps.gov/sagu/learn/nature/gila-monster.htm

[6] https://www.nytimes.com/2023/08/17/health/weight-loss-drugs-obesity-ozempic-wegovy.html

[7] J. Rice, C.S. Seixas, M.E. Zaccagnini et al. 2018. *Summary for Policymakers of the Regional Assessment Report on Biodiversity and Ecosystem Services for the Americas of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*. Available at: https:// https://www.ipbes.net/assessment-reports/americas.

[8] https://www.usda.gov/media/blog/2012/08/07/agricultures-role-ecosystem-services

The ESA recognizes that timely listing of species is important to achieving the goals of the Act. For that reason, the Act imposes a 12-month deadline for listing decisions. *See* 16 U.S.C. § 1533(b)(3)(B) (listing findings required within 12 months of receipt of petition). In fact, one court noted that Congress has "expressed particular concern for species that had languished for years in status reviews" and "passed the 1982 amendments" to the ESA "for the very purpose of curtailing the process." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1175 (9th Cir. 2002) (cleaned up). The court rejected "an interpretation of the ESA in which listings could admittedly take years." *Id*.

Given the pace of the extinction crisis and the inadequate funding the Services receive to keep up with listing petitions, the Services currently maintain a five-year listing work plan [9] used to prioritize species and predict when certain decisions may be made. The bill would seize on this work plan concept and use it to substantially extend the listing process, eliminating the current mandatory 12-month deadline and providing little recourse in the event that a species rapidly declines and fast action is needed. (The bill does retain the Services' discretion to use its emergency listing authority, but citizens can do little more than request emergency listing, as the ESA does not authorize emergency listing petitions.[10])

Specifically, the bill requires Interior to create and submit annually to Congress a "national listing work plan" with species assigned a priority classification. Depending on a species' priority, the bill gives the Services at least seven years, and for lower-priority species up to 12 years, to make listing decisions—an enormous extension of the current 12-month deadline. Moreover, there is little recourse for the misclassification of species as lower priority, as the bill specifies that classifications are not final agency action which therefore cannot be challenged in court.

Expressly allowing listing decisions to drag on for up to 12 years could ultimately condemn the species to extinction, especially given the precarious state many candidates for listing are in today. Imagine if, in the early years of federal species listing, species such as California condors, Florida panthers, or whooping cranes had been denied listing for up to a dozen years when their numbers had dwindled to almost nothing. They might not be with us anymore. In the years since the Act's passage, it has again been necessary to move quickly to list species that show dramatic decline, both in emergency and non-emergency listings. For example, in 1990 the Fish and Wildlife Service listed the golden-cheeked warbler, which had dwindled to a few thousand, in under a year (*see* 55 Fed. Reg. 18,844 (emergency listing)). Happily, the warbler's numbers have increased since its listing, and there are at least several times that number as of the species' last five year review.[11] And in 1985, the Service listed the West Virginia northern flying squirrel as endangered only eight months after its proposed listing due to habitat loss and other threats (*see* 50 Fed. Reg. 26999 (non-emergency listing)). Recovery actions led to the Service deeming the species recovered and removing it from the endangered species list in 2013 (*see* 78 Fed. Reg. 14,022). As these successes illustrate, we should be shoring up the Services' capacity to move forward with rapid listings when the need arises—not encouraging listings to move more slowly.

Worse still, while forcing species to wait in a long line to receive ESA protections, at the same time this bill would create a speedy exit ramp for species to lose protections via delisting. There is not currently a deadline for initiating species delisting after a status review indicates that the species' listing status should change. This bill would change that. Under the bill, after a decision to delist or "downlist" (*i.e.*, change a species from endangered to threatened), the Services would have to initiate rulemaking to carry out the decision within 30 days. Forcing the Services to move forward so quickly with rulemaking to delist threatens to strain agency resources.

The bill does not stop there, however. It also states that delisting cannot be reviewed by a court during a five-year monitoring period after delisting. This would delay justice for wrongly delisted species—indeed, a five-year pause on litigation is long enough that the species could decline toward extinction during the five-year timeframe.

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[9] https://www.fws.gov/project/national-listing-workplan

[10] *See* https://www.fws.gov/sites/default/files/documents/ESA-Public-Petition-Guidance.pdf.

[11] U.S. Fish and Wildlife Service. "Golden-cheeked warbler 5-Year Review: Summary and Evaluation" (2014). https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/2219.pdf

The Bill Would Significantly Increase Allowable Take of Threatened Species, Create a Complex and Difficult-to-Administer New Regime for Managing Threatened Species, and Diminish the Longstanding Federal Role in Listed Species Management [Sections 301 and 304]

Multiple provisions of the bill work together to significantly increase allowable "take" of threatened species (i.e., harm, harassment, killing, etc.) and create a new regulatory scheme that would load new burdens onto already overstretched state and federal wildlife agencies.

Under the guise of "protective regulations," the bill would provide far less protection. To understand how the bill does this, it is important to know as a threshold matter that species listed as threatened under the ESA do not automatically receive the same protections that are afforded to endangered species. Instead, those protections must be extended by regulation. Section 4(d) of the Act provides the Services with the authority to enact such regulations, including, importantly, regulations that provide threatened species with the protections against take that endangered species receive at the time of listing. 16 U.S.C. § 1533(d); *compare id*. § 1538(a) (take protection for endangered species).

For decades, the Fish and Wildlife Service has relied on a so-called "blanket 4(d) rule" to automatically extend these protections to the threatened species that it manages—*i.e.*, land and freshwater species. (The Service also retained the option to provide tailored protections for specific species in specific instances.) A misguided 2019 regulation withdrew the blanket rule, but in April 2024 the rule was reinstated, and today it continues to protect threatened terrestrial and freshwater species against take. *See* 84 Fed. Reg. 44,753 (Aug. 27, 2019); 89 Fed. Reg. 23,919 (Apr. 5, 2024).

Section 304 of the bill would reinstate the 2019 removal of the blanket 4(d) rule, giving the removal the force and effect of law. Importantly, this provision would prevent the Fish and Wildlife Service from enacting *any* blanket rule in the future unless the law were changed.

This prohibition would create a void: without the blanket rule, threatened species have no take protections unless those protections are specifically granted on a species-by-species basis. The need to act on a per-species basis plainly would require additional resources that would divert scarce Fish and Wildlife Service resources from other important conservation priorities.

Worse still, section 301 of the bill would block the Services from ever completely filling the void left in the wake of the blanket rule, preventing species already at risk of extinction in the foreseeable future from receiving the very protections they need to avoid that fate. This section dramatically limits how much take protection can be afforded to any threatened species (whether terrestrial, freshwater, or marine). Specifically, under the bill, if the Services issue a 4(d) rule that prohibits take, they must provide for a decrease in the stringency of the take prohibitions over time as recovery goals are met and must provide for state management over the species once recovery goals are met—even while a species is still listed.

These provisions are a dramatic change from the status quo and may be catastrophic to our nation's threatened wildlife. First, the bill would shift from a simple and efficient regime, under which Fish and Wildlife Service simply affords take protection to all threatened species in a blanket rule (with customized protections created only on an as-needed basis), to a complex and inefficient one, under which protections are analyzed and implemented species-by-species under a complicated, multi-step scheme. This would almost certainly delay or block needed protections for some species and divert much-needed resources away from the statute's fundamental purpose—to move threatened and endangered species along a path to recovery and a place where they no longer need the ESA's protections.

Second, the bill would shift management of threatened species toward state agencies and away from the federal agencies that have handled these matters for decades. Turning over management of threatened species from federal to state authorities *while the species are still on the federal ESA list* makes little sense. Even setting aside concerns that many state agencies lack the funds to manage federally listed species, often species are known to occur in multiple states. Extending state management over federally listed species would invite interstate conflict and could subject listed species to inconsistent and inadequate protection.

Finally, allowing more take of threatened species invites these species' decline. The point of listing species when they are threatened—*i.e.*, when they may foreseeably become endangered and at risk of extinction, but are not there yet—is to prevent their numbers from dwindling before the situation becomes more critical. Increasing take of threatened species has the opposite effect. Moreover, placing threatened species' recovery further out of reach is expensive, as naturally it costs

more to recover a species the further it has slid.[12] For example, California condors' numbers dipped so low that individual animals have needed emergency treatment at zoos—causing disruption and expense that is best avoided by addressing threats at a much earlier stage.

Some of our nation's most iconic species, like manatees and polar bears, are listed as threatened, and that trend is likely to continue. These species should be proactively recovered—not taken in greater numbers leading to accelerated declines rather than recovery.

The Bill Would Chip Away At Critical Habitat by Creating a Series of Ill-Defined and Hard-to-Apply Carveouts [Section 202]

In passing the ESA Congress recognized that imperiled species' habitat must be protected if they are to survive and recover. For that reason, the Act requires that with limited exceptions critical habitat be designated for all listed species. *See* 16 U.S.C. § 1533(a)(3). That habitat then receives special protection, including protection from "destruction or adverse modification" under section 7. *Id*. § 1536(a)(2). The prohibition against destruction or adverse modification of critical habitat only applies to activities carried out, funded, or permitted by federal agencies, and does not apply to private landowners unless there is a federal nexus.

The current process of designating critical habitat is grounded in science and is also pragmatic. Designation is conducted based upon the best available science, with economic and security considerations also folded into the process. *Id*. § 1533(b)(2).

The bill would make this sensible process far more complex, creating a series of complicated carveouts from critical habitat that would be difficult to apply. Even if the Services did manage to apply them, the carveouts could serve only to subtract from the habitat protections that imperiled species need to survive.

Specifically, the bill would preclude critical habitat designation on a wide array of lands—*i.e*., any privately owned or controlled land or other geographical area, so long as there is a land management plan in place that meets a complicated string of criteria. Applying these criteria would require the Services to make judgments about (to name just two examples): whether a state or federal land management plan is "similar in nature to" a management plan for military installations under another federal statute called the Sikes Act; and whether the plan (again, state or federal) is submitted "in a manner that is similar to" the submission of a Habitat Conservation Plan under section 10 of the ESA.

Even identifying what lands qualify for these carveouts would be massively time-consuming and resource intensive, apparently requiring the Services to assess a wide array of *state and federal* land management planning regimes that they may never have encountered before. But assuming the Services could even manage to apply the carveouts, the results would undermine the survival and recovery of listed species. Any land carved out from critical habitat designation under this provision would almost certainly be provided far less protection than critical habitat.

The Bill Would Codify Harmful 2019 Regulatory Definitions, Narrowing Critical Habitat Still Further, Impeding Species Listings, and Increasing the Risk that Federal Agency Actions Harm Species [Section 2]

The bill would enshrine in statute several 2019 regulatory definitions, most of which have since been reworked by the Services. These changes would do real harm to species and their habitat.

Foreseeable Future

First, the bill would redefine the term "foreseeable future," which is important because threatened species are defined under the ESA as species likely to become endangered within the foreseeable future. *See* 16 U.S.C. § 1532(20). The way that the Services define the term "foreseeable future" therefore influences whether a whole suite of species receives ESA protection.

The bill would codify a now-abandoned 2019 definition of the term under which the foreseeable future extends only as far as the Services can determine that the species' threats are "likely." 84 Fed. Reg. 45,020, 45,052 (Aug. 27, 2019); *cf*. 89 Fed. Reg. 24,300, 24,335 (Apr. 5, 2024). By using the term "likely," the 2019 definition appears to jettison a longstanding practice of using extrapolation and scientifically grounded prediction, based upon available scientific data, to assess foreseeable

[12] *See* Shortchanged: Funding Needed to Save America's Most Endangered Species, Center for Biological Diversity, at p. 6, https://www.biologicaldiversity.org/programs/biodiversity/pdfs/Shortchanged.pdf.

future threats to species. A 2009 "M-Opinion" from the Interior Department [13] for a decade provided lengthy, detailed, and well-respected guidance on how to approach decisions where data is limited. The 2019 regulations unwisely departed from that guidance by fashioning a new "likelihood" standard; the 2024 regulations partially reinstated the well-respected prior standard, but the bill would undo that improvement.

Habitat

In addition, under the bill a new definition of "habitat" applicable for purposes of designating critical habitat would exclude currently unoccupied habitat. This exclusion would prevent the Services from designating critical habitat in areas that might be needed to conserve species in the future even if those areas cannot support the species right now.

The proposed definitional change expands upon, and worsens, a 2019 regulatory change that limited, but did not altogether eliminate, the designation of currently unoccupied habitat. *See* 84 Fed. Reg. at 45,053. That 2019 change was recently reversed, *see* 88 Fed. Reg. 40,764, 40,768 (June 22, 2023); 89 Fed. Reg. at 24,335, but would be reinstated and significantly worsened in the current draft bill.

Excluding currently unoccupied critical habitat ignores the scientific reality that climate change is rapidly shifting the geographic locations of areas that support species.[14] For example, species may move northward, or further up mountain slopes, as they seek refuge from hot and dry conditions or follow shifting vegetation patterns.[15] It is very important that the Services retain the ability to designate currently unoccupied habitat that may well be vital to species' survival in the future.

Environmental Baseline

Finally, the bill would codify the 2019 definition of the term "environmental baseline." The environmental baseline is important in consultations under section 7 of the ESA, in which the Services analyze the effects of agency actions by adding those effects to the environmental baseline. 50 C.F.R. § 402.14(g). Inflating the baseline—by shifting harms from the "effects" to the "baseline" side of the ledger—obscures the harms of agency actions by making the effects look small in comparison with the existing picture. This increases the temptation to dismiss harmful effects as minor. The bill encourages just such faulty reasoning by folding certain ongoing agency activities into the baseline. It is harmful to include ongoing activities in the baseline because ongoing activities are sometimes the very activities that jeopardize species. For example, dams in the Pacific northwest that predate the ESA have placed some native salmon runs in jeopardy in a way the ESA forbids, but if these "ongoing" harms are simply part of the baseline, they are rarely or never addressed in ESA consultation.

The Candidate Conservation Agreement with Assurances Provisions of the Bill Would Weaken the ESA's Core Protections [Section 201]

Candidate Conservation Agreements with Assurances (CCAAs) cover "candidate species," or species that have not been listed yet, and are designed to address identified threats and proactively conserve the species. CCAAs may be used, for example, to provide a benefit to species that the Service has concluded warrant listing, although listing is currently precluded by the need to proceed with higher priority actions. Under these CCAAs, if a species ultimately is listed then participants in the agreement are automatically given a permit that covers activities that may result in taking the newly listed species.

Recent problems indicate the CCAA program needs substantial reform in order to meet its goals. For example, in Texas, the failure of the Texas Conservation Plan to protect sufficient dunes sagebrush lizard habitat led the Texas state government to terminate that CCAA and surrender the permit issued under it.[16] In addition, an audit of a multi-state CCAA covering the lesser prairie-chicken found that the CCAA was not meeting its conservation goals, and that the agreement as written

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[13] Available at https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37021.pdf.

[14] *See, e.g.*, Melanie A. Harsch, et al., Moving Forward: Insights and Applications of Moving-Habitat Models for Climate Change Ecology, J. Ecology (2016); Jennifer Wilkening et al., Endangered Species Management and Climate Change: When Habitat Conservation Becomes a Moving Target, Wildlife Society Bulletin (2019), https://wildlife.onlinelibrary.wiley.com/doi/abs/10.1002/wsb.944.

[15] I-Ching Chen, et al., Rapid Range Shifts of Species Associated with High Levels of Climate Warming, Science (2011), https://www.science.org/doi/10.1126/science.1206432.

[16] November 8, 2018 Letter from the Texas Comptroller of Accounts to the U.S. Fish and Wildlife Service, https://www.biologicaldiversity.org/species/reptiles/dunes_sagebrush_lizard/pdfs/DSL-plan-withdraw-letter.pdf

did not allow the Fish and Wildlife Service to properly assess the CCAA's performance.[17]

This bill would make the CCAA program—which, as noted, already needs improvement—weaker. For example, the bill would *require* agencies to approve a CCAA proposal if it meets certain requirements. *See, e.g.*, 50 C.F.R. § 17.32(d). This shift risks converting agency scrutiny of CCAA applications into something more akin to a box-checking exercise. Worse still, the bill would make CCAAs available on federal lands (to federal land lessees or permittees) and then deem them exempt from ESA section 7 inter-agency consultations and ESA substantive standards—no matter their size or scope. These provisions could pave the way for extractive resource uses on federal lands without any review under section 7: the vital consultation program that ensures that federal activities are not likely to jeopardize the continued existence of a listed species or adversely modify or destroy its critical habitat.

In addition, the bill inappropriately gives the CCAA program undue weight in the implementation of other parts of the ESA by requiring the Services to factor in the existence of CCAAs when considering whether to list that species as threatened or endangered.

The Bill Would Obliterate Science-Based Decisionmaking [Section 402]

A bedrock principle of the ESA is to require that decisions be made using the best scientific and commercial data available. This "best available science" must be used in listing decisions, consultations under the Endangered Species Act, and more. *E.g.*, 16 U.S.C. §§ 1533(b), 1536(a)(2). The standard plays a critical role in ensuring that important decisions about the future of our nation's wildlife are based on information that is high-quality and reliable. The standard also builds inherent flexibility into the ESA, allowing management to adapt as science uncovers more about the fascinating array of native animals and plants that surround us.

The proposed bill would take a sledgehammer to scientific decisionmaking. It would require that a huge and undefined new class of information—*anything* submitted by a state, tribal, or county government—be *deemed* "best available science" without any assessment of its quality. It would allow these entities to pick and choose which information to submit, creating a risk of missing important updates to the science or even a temptation to elevate the information that supports a desired result. Assuming that any information submitted is even scientific and commercial data at all—let alone the best data—goes against the very purpose of the scientific process, in which rigorous review by skeptical peers generates information of the highest quality.

The Bill Would Erode Public Accountability in Wildlife Management [Sections 303, 101, 403, and 404]

In a nation built on checks and balances, we count on judicial review to ensure that important agency decisions are well-grounded and in line with Congressional intent. This bill touts "greater transparency and accountability," but instead promotes the opposite by chipping away at the judicial review function in multiple ways.

First, as mentioned above, the bill constricts judicial review of delisting decisions by foreclosing review for five years after delisting. Second, also mentioned above, the bill makes priority classifications that would significantly influence the timing of listing unreviewable by courts. Finally, the bill includes provisions aimed at deterring citizens from bringing ESA lawsuits by cutting attorney's fees available in some ESA cases. The overall effect is to decrease, not increase, agency accountability.

The Bill Would Foreclose Full Mitigation For Some Agency Actions that Harm Listed Species [Section 501]

The bill not only fails to mandate full mitigation for agency actions that harm listed species, in some circumstances the bill *precludes* full mitigation. By way of background, when the Services conduct ESA section 7 consultations to ensure that federal agencies do not take actions likely to jeopardize species or destroy their critical habitat, the Services sometimes issue "incidental take statements" to insulate the action agency against take that may occur as part of the action. These statements include "reasonable and prudent measures" to minimize take. 16 U.S.C. § 1536(b)(4). Under current regulations, reasonable and prudent measures "may

[17] See Western Association of Wildlife Agencies, "2019 Annual Report for the Range-wide Oil and Gas Candidate Conservation Agreement with Assurances for the Lesser Prairie Chicken," https://www.wafwa.org/Documents%20and%20Settings/37/Site%20Documents/Initiatives/Lesser%20Prairie%20Chicken/Annual%20Reports/2019%20LPC%20CCAA%20Annual%20Report.pdf.

include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take." 50 CFR §402.14(i)(2). Reasonable and prudent measures are also already subject to various conditions to protect permittees, including that the Services "cannot alter the basic design, location, scope, duration, or timing of the [permittees'] action" and the measures "may involve only minor changes [to the proposed action]." 50 CFR 402.14(i)(2).

Under the bill, reasonable and prudent measures *would not be allowed to* require the beneficiary of the statement to "fully mitigate or offset" the impact. It is baffling that the bill would *remove* the discretion of the agency to require full mitigation that may be needed to avoid undue harms. Under this bill, even if full mitigation would have the same cost to the permittee as partial mitigation, the agency would be forced to impose only partial mitigation—plainly an inefficient result.

Precluding full mitigation for federal agency action will increase the rate of decline of species and habitat that mitigation is intended to arrest. Human-caused habitat destruction is currently the most significant driver of the biodiversity and extinction crisis.[18] The United States Geological Survey has calculated that from 2001–2016 a remarkable 7.6% of U.S. land cover in the lower 48 states changed at least once.[19] Habitat modification is a threat to a significant majority of listed species and has become more of a driving threat to imperiled species over the life of the Endangered Species Act.[20] Often these harms accumulate gradually, risking "death by a thousand cuts." The Services have tried to stem this trend by providing for offsets in reasonable and prudent measures. 88 Fed. Reg. at 40,761 (requiring offsets where appropriate is needed to reduce as much as possible "the accumulation of adverse impacts, sometimes referred to as 'death by a thousand cuts'"). This bill would roll that policy back.

The removal of discretion may thwart other existing agency policy as well. For example, FWS has set forth a "no net loss" goal in its mitigation policy,[21] and NOAA's Mitigation Policy for Trust Resources has set out a goal of "compensatory mitigation that is proportional to impacts to NOAA trust resources and offsets those impacts to the full extent provided by NOAA authorities."[22] It is hard to see how these no net loss objectives could be tenable if full mitigation is not allowed.

Conclusion

Preserving our wildlife and the places they call home is a responsibility that transcends human lifetimes. Our future depends on the actions we take now to heal the fabric of life and ensure it can be sustained for years to come.

At this critical moment for the biological health of our planet, the nation must reinvigorate its commitment to conserving imperiled species and their habitat. We must support and strengthen the existing legal and policy framework to better protect wildlife, with the ESA as its cornerstone. Any changes to this bedrock law must be judged by whether they stave off species extinctions, improve species conservation, and support long term recovery. Congressional interference in science-based decisions about how to conserve species is both reckless and inappropriate and would ultimately only serve to undermine the nation's ability to protect biodiversity. As a nation and as responsible stewards of our irreplaceable imperiled wildlife and special places, we can and we must do better. Those that follow us are expecting us to pass on a healthy, vibrant environment replete with wildlife for all to enjoy.

Regrettably, the legislation being considered today would dramatically weaken the ESA and make it harder, if not impossible, to achieve the progress we must make to address the alarming rate of extinction our planet is facing. Failure to conserve our planet is not an option and this legislation being considered today clearly sends us in that direction.

Thank you for considering my testimony.

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[18] IPBES, Global Assessment Report on Biodiversity and Ecosystem Services, https://www.ipbes.net/global-assessment.

[19] USGS, New Land Cover Maps Depict 15 Years of Change across America, https://www.usgs.gov/news/national-news-release/new-land-cover-maps-depict-15-years-change-across-america.

[20] Matthias Leu et al, *Temporal analysis of threats causing species endangerment in the United States*, Conservation Science and Practice, 2019.

[21] *See* 88 Fed. Reg. 31,000 (May 15, 2023).

[22] NAO 216-123: NOAA Mitigation Policy for Trust Resources, https://www.noaa.gov/organization/administration/noaa-administrative-orders-chapter-216-program-management/nao-216-123-noaa-mitigation-policy-for-trust-resources#:~:text=Compensatory%20Mitigation%20%E2%80%93%20a%20method%20of,with%20commensurate%2

QUESTIONS SUBMITTED FOR THE RECORD TO ELLEN RICHMOND, SENIOR ATTORNEY, DEFENDERS OF WILDLIFE

Questions Submitted by Representative Grijalva

Question 1. The Water Rights Protection Act, H.R. 7544, would prohibit the Secretary of the Interior and the Secretary of Agriculture from conditioning future permits on federal land on the transfer of water rights to the federal government or, in some instances, a requirement that the permit holder apply for water rights in the U.S. government's name. The implications of this legislation are widespread and have real consequences for tribal water rights and the environment. If enacted, H.R. 5744 could greatly inhibit the federal government's ability to the protect Indian water rights and the health of our public lands and nation's water resources as land managers will no longer be able to restrict the use of water on federal lands for the benefit of the public and would likely result in agencies having to deny permits to applicants and reduce access to our public lands.

1a) In your opinion, what is the role of the federal government in addressing environmental concerns and climate change?

Answer. The federal government plays the primary role in addressing environmental concerns, and it must continue to do so. Indeed, without strong federal government involvement, these broad collective challenges cannot be solved. To illustrate this, I will address in turn the importance of federal action on each of the "twin crises" of our age—(1) the rapid loss of species and (2) accelerating climate change.

First, the federal government and federal law are the last refuge of wildlife facing extinction. States generally manage species that are not at risk of going extinct, but if after decades of state management species continue to decline, it is vital that the federal Endangered Species Act serve as a backstop to prevent species from disappearing forever. The federal wildlife agencies are the experts who are responsible for our national commitment to preventing extinction. In addition, numerous federal agencies play a vital role in protecting wildlife on federal lands—including the National Park Service, Fish and Wildlife Service, Forest Service, Department of Defense, Bureau of Land Management, and more. These agencies' actions can ensure that federal lands provide a refuge for wildlife, providing them room to roam and creating opportunities for Americans to visit wild places and marvel at our collective natural heritage.

A National Biodiversity Strategy would be the most effective way to ensure a coordinated and comprehensive national response to the extinction crisis. Such a strategy would knit together all federal agencies' authority to create a blueprint for effectively tackling the challenge. The strategy would provide each agency an opportunity to plan for addressing drivers of biodiversity loss, securing and restoring ecosystem services, promoting social equity and justice, and reestablishing our nation as a global leader in biodiversity conservation. A National Biodiversity Strategy also would situate the protection of biodiversity alongside other important national goals and would provide an opportunity to better harmonize approaches across agencies and sectors.

Second, like biodiversity loss climate change is a broad and collective problem that cannot be solved by individuals or private businesses alone. The release of global warming gases does not respect state borders—instead, when we burn fossil fuels the effects are felt in the troposphere that surrounds our entire nation and world. This warms the entire planet. In addition, climate change is already shifting ecosystems and impacting every system on our planet, including humans, wildlife, water and agriculture. For example, in North America, nearly half of species are already undergoing local extinctions, which are partially due to spatially variable changes in temperature and precipitation.[1] Given the scale of the problem, the most effective solutions are those that can be implemented broadly. In the United States, that means the federal government must be the leader in addressing this challenge by lowering emissions, supporting nature-based climate solutions, and implementing effective climate adaptation strategies for wildlife and people.

As we face the twin crises of extinction and climate change, we are all in this together. We should work as a nation, led by our national government, to face these collective challenges head-on.

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[1] *See* Wiens 2016, https://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.2001104; Roman-Palacios and Wiens 2020, https://www.sciencedaily.com/releases/2020/02/200212150146.htm.

1b) Do you believe that the federal government should have the ability to manage water resources for the protection of resources on our public lands for the benefit of all Americans?

Answer. Yes. The federal government already has this ability and must retain it.

It is impossible for the federal government to administer federal lands that benefit all Americans without the ability to manage water resources. This is especially true in the arid West, where some lands do not support life unless water is available. For that reason, the Supreme Court has long recognized that lands reserved for the federal government include the underlying water rights needed to administer the land for its intended purpose.

Critically, this means that tribal reservation lands include the underlying water rights needed to make the land inhabitable and suitable for cultivation. In the foundational case of *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court recognized this basic but critical reality, holding that a claim to water is reserved alongside the reservation of tribal land. Otherwise, the full use of reservation land would be significantly impaired.

Other federal lands likewise must include sufficient underlying water rights to fulfill the intended federal purpose. For example, in *Cappaert v. United States*, 426 U.S. 128, 139 (1976), the Supreme Court held that a private water rights seeker could not pump water in a way that would harm Devil's Hole cavern, in Death Valley National Monument, and the desert pupfish, an imperiled species dwelling in the cavern. Federal reserved water rights have been affirmed by the courts repeatedly over the years. *E.g., Sturgeon v. Frost*, 139 S. Ct. 1066, 1079 (2019) ("When the federal government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.") (cleaned up).

In addition to the federal law that allows agencies to assert reserved water rights, a wide variety of federal land management statutes charge agencies with safeguarding ecosystems in a way that requires water. For example, the national forests under the jurisdiction of the Forest Service "shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. In the arid west, none of these purposes can be fulfilled without water available—for example, recreationalists often wish to explore verdant forests, and wildlife depend on streams and other water sources for survival. The Federal Lands Management and Policy Act, which guides management of lands under Bureau of Land Management (BLM) jurisdiction, likewise contains a "multiple-use" mandate to manage for wildlife, recreation, and similar values, not just extractive uses. 43 U.S.C. § 1701. And the Organic Act for the National Park Service directs that agency to manage parks "to conserve the scenery, natural and historic objects, and wildlife in the [parks] and to provide for the enjoyment of the scenery, natural and historic objects, and wildlife in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). Virtually all of these values—beautiful landscapes, abundant wildlife, and long-term ecosystem health—depend on water.

Healthy federal lands are critical for imperiled wildlife and important to all Americans. Federal lands belong to all Americans—and visiting them is wildly popular. Iconic national parks like Yellowstone and Grand Canyon provide the family vacation of a lifetime for millions each year.[2] And there are so many other federal lands to enjoy—not just national parks, but wilderness areas, national wildlife refuges, national seashores, national forests, and more. Making sure that agencies can provide water for these lands keeps them verdant and replete with wildlife for all to enjoy.

Federal water rights are also a critical part of ensuring that federal tribes continue to enjoy the right to keep tribal lands available for cultivation, development, or preservation according to the values of individual tribes. Federal reserved water rights protect this basic, obvious, and essential right.

1c) If state law was the only consideration in terms of allocating and regulating water rights, do you believe that fish and wildlife have the necessary protections to sustain populations and habitat?

Answer. No. State law does not ensure that the fish and wildlife that inhabit federal lands have adequate water to meet their needs.

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[2] The Park Service tallies over 300 million visitors to all national parks last year. https://www.nps.gov/aboutus/visitation-numbers.htm

Most western states apply the doctrine of "prior appropriations" to allocate water rights; this doctrine is often summarized as "first in time, first in right." In other words, under the doctrine of prior appropriations, "a person acquires an enforceable water right to use water only upon actually diverting the water from its natural source and applying it to a beneficial use."[3]

However, as the *Cappaert* case illustrates, exclusive reliance on state water law can expose special places and wildlife to serious harm, since the prior appropriations system may not adequately account for instream flows needed to sustain ecosystems and wildlife. Even where available, instream flows are generally still subject to the "first in time" priority system. (This may not be true in all states, but is generally true of states in the west that organize water rights using prior appropriations.)

Cappaert involved an underground pool—a unique remnant of a prehistoric chain of lakes that was home to "a peculiar race of desert fish" found only in such settings and nowhere else in the world. 426 U.S. at 132. This "peculiar" fish is the desert pupfish, a federally listed endangered species. The pool that the fish called home was part of Death Valley National Monument. The owners of a nearby ranch applied for state permits to pump additional water for their operations in a manner that would have lowered the level of the underground pool and harmed the monument and the fish. The Nevada State Engineer, ruling on the water application, found "that there was no recorded federal water right with respect to Devil's Hole"—which would have allowed the pumping to go forward. It was only the protests of the National Park Service, ultimately upheld by the Supreme Court, that led to recognition of the Park Service's reserved water right protecting the pool and its wildlife.

This issue has recurred over past decades, including in Rocky Mountain National Park, Dinosaur National Monument, and Yellowstone National Park, where reserved water rights are essential to protecting in-stream flows that benefit wildlife.[4] To this day, reserved water rights continue to be asserted for the protection of a broad variety of parks and preserves. For example, earlier this year the U.S. Fish and Wildlife Service underscored that proposed mining near the Okefenokee National Wildlife Refuge—a vibrant wilderness in southeast Georgia—must take into account federal reserved water rights "to ensure the long-term health and viability of the Okefenokee wetland ecosystem."[5]

Stripping federal authority over water would place wildlife at serious risk. Federal lands provide large swaths of wildlife habitat. Increasingly, this "room to roam" is a special feature of federal land, as other lands are converted and developed. BLM, for example, "manages more fish, wildlife and plant habitat than any other federal or state agency in the country; more than 3,000 species of wildlife live on BLM-managed public lands."[6] It is essential to continue federal agencies' ability to manage water for the benefit of these species, not to mention to provide for recreation and fulfill their other responsibilities under applicable law (discussed in the response to the preceding question).

Moreover, many states do not place adequate restrictions, or any restrictions at all, on groundwater withdrawals. This is a serious problem for biodiversity and wildlife as well. The Edwards Aquifer in south-central Texas is one example. This massive underground water system supports an extraordinary array of species and ecosystems, including fish and salamanders that do not occur elsewhere.[7] As federal agencies have pointed out, a primary threat to these species is over-pumping of groundwater without adequate restrictions under state law, which has increased steadily over the years.[8] (For decades, this occurred with no restrictions at all, although major land subsidence and the threat of ecosystem collapse have led to some additional restrictions more recently.[9])

As an additional complication to exclusive reliance on state water law, states have not always supported tribal water rights. As one recent news article describes,

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[3] Reid Peyton Chambers & John E. Echohawk, *Implementing Winters Doctrine Indian Reserved Water Rights: Producing Indian Water & Economic Development Without Injuring Non-Indian Water Users?* (1991) at p. 3, https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1081&context=books_reports_studies&httpsredir=1&referer=.

[4] John R. Little, Jr. and Ralph O. Canaday, *U.S. Dept. of the Interior Office of the Solicitor, Reserved Water Rights and the National Park Service, the Present Status and Future Problems*, at pp. 66-68, https://npshistory.com/publications/water/reserved-water-rights.pdf.

[5] https://defenders.org/blog/2024/04/fish-and-wildlife-service-raises-shield-okefenokee-setting-stage-permanent-protections

[6] https://www.blm.gov/programs/fish-and-wildlife.

[7] https://ecos.fws.gov/docs/recovery_plan/960214.pdf

[8] *Id*. at 16-18.

[9] *E.g.*, https://docs.gato.txst.edu/137507/Raiders%20of%20the%20Lost%20Aquifer.pdf, at pp. 269-270.

decades ago "[s]tates successfully opposed most tribes' attempts to have their water rights recognized through the landmark case [of *Arizona v. California*], and tribes have spent the decades that followed fighting to get what's owed to them under a 1908 Supreme Court ruling [*Winters*] and long-standing treaties." [10] Tribes have had to depend on the U.S. Department of Justice to defend their interests in water, making federal water management incredibly important.

1d) How would H.R. 7544 limit federal agencies from ensuring the management of our nation's water resources contain reasonable safeguards to protect fish, wildlife, and recreational benefits?

Answer. H.R. 7544 threatens to erode the ability of federal agencies to safeguard fish, wildlife, and recreation on federal lands. In addition, broad and ambiguous provisions in the bill pose a far broader threat to federal authority, raising an unacceptable risk of kneecapping the federal land agencies charged with conserving America's lands and wildlife.

The bill provides that a broad swath of federal actions—including all permits or rights-of-way, as well as many other federal actions—must be "consistent with, and impose[] no greater restriction or regulatory requirement, than applicable State water law." This provision would harm federal land management in several harmful ways.

First, the provision could preclude federal agencies from asserting federal reserved water rights while considering permits to conduct activities on federal lands—even if the proposed activities would dry up beloved federal lands or leave wildlife without adequate water. It is true that the bill contains a savings clause providing that "Nothing in this Act limits or expands any existing or future reserved water rights of the Federal Government on land administered by the Secretary [of Interior or Agriculture]." However, the savings clause may not be adequate to ensure that federal reserved water rights are asserted in a uniform and effective manner. By setting state water law as the standard for all permitting, with an exception only for reserved water rights, the bill could lead to a need for a formal assertion of water rights for otherwise simple decisions on permits or land use approvals—which at the very least could be cumbersome, time-consuming, and expensive.

Second, outside the context of reserved water rights, the bill sets state water law as the ceiling for protective measures relating to water in federal land management decisions. This is an independent threat to federal management of species and ecosystems. For example, on BLM land that may lack the sort of special federal "reservation" or designation that would lead to reserved water rights, the bill would preclude *any* project conditions that require more than state water law requires. Depending on the underlying state law, this could interfere with the agency's ability to protect the environment in considering projects on federal lands that belong to everyone.

To make this concrete, BLM is currently considering many applications to build solar power on federal land. As one BLM representative explained in prior testimony to this Committee, "[t]he potential effects of solar energy development on the desert's scarce water resources and aquatic habitats are []important issues" given "the region's chronic water scarcity and water allocation issues." [11] Because such projects can use significant water—including, in remote areas, groundwater resources that may already be overdrawn—BLM needs the ability to ensure that these projects do not have unacceptable impacts on the dry western landscape and species that depend on it.[12]

Third, the applicable provision is drafted so broadly that it threatens to have impacts even outside water issues in federal land use permitting. The bill makes "State water law" the ceiling—i.e., the only applicable restriction *of any kind*—for numerous federally issued approvals. The bill thus threatens to strip away not just the assertion of federal water rights but also the protections of a broad suite of other applicable federal law (such as the multiple-use mandates described above). Without recourse to these laws, federal agencies would not be able to protect landscapes, wildlife, and recreation as Congress has charged them with doing.

Worse still, the provision described above applies to an exceedingly broad suite of federal actions. It could be read to reduce federal authority to impose restrictions not only in federal permits, but in "any *rule, policy, directive, management plan*, or

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[10] Mark Olalde & Anna V. Smith, Pro Publica, *Western States Opposed Tribes' Access to the Colorado River 70 Years Ago. History Is Repeating Itself*, https://www.propublica.org/article/states-tribes-water-rights-history-repeating-itself.

[11] https://www.doi.gov/ocl/hearings/111/SolarEnergyDevelopment_051109

[12] *E.g.*, https://www.nrel.gov/docs/fy15osti/61376.pdf.

similar Federal action *relating to* the issuance, renewal, amendment, or extension of *any* permit, approval, license, lease, allotment, easement, right-of-way, or other *land use* or occupancy agreement." Under the proposed bill, *all* of these must impose "no greater restriction or regulatory requirement" than state water law. If interpreted broadly, this provision would make state water law the ceiling for *any federal land use rule*—which, taken literally, would hamstring federal agencies attempting to engage in any land use activities, including general planning and policymaking. In other words, this bill threatens to broadside not only federal water rights, but virtually all federal land use authority.

The provision discussed above is not the only damaging portion of this bill. Section 3, item (2) is also highly problematic. That provision prevents federal agencies from "assert[ing] any connection between surface water and groundwater that is inconsistent with such a connection recognized by State water law." It is a physical and biological reality that surface water and groundwater are often connected.[13] Recognition of this reality is critical for federal agencies considering land uses that would deplete water for species and ecosystems on federal land. For example, concerns about depletion of groundwater caused by mining in the vicinity of Ash Meadows National Wildlife Refuge have led BLM to reject some applications for mining near the refuge.[14] Some states, in contrast, deny the connection between groundwater and surface water or severely limit it. It would be highly damaging to federal lands if agencies' ability to recognize this connection, and place conditions on pumping that would harm surface waters, were hamstrung by this bill.

Plainly, wildlife that depend on federal lands would suffer if this bill were to be signed into law. In addition to the examples provided throughout this letter, bull trout and cutthroat trout, which depend on streams flowing through Forest Service lands in the mountain west, might be deprived of in-stream flows if the federal ability to protect those flows is diminished.[15] Federally endangered Appalachian hellbenders—the iconic giant salamanders of eastern hardwood forests—also depend on cool, clean streams on federal lands, such as New River Gorge National Park and Preserve—which must be safeguarded if the hellbender is to recover.[16]

In addition to harming these and other species and escalating our biodiversity crisis, by obstructing federal lands and resource management this bill threatens to make federal landscapes less verdant and less vibrant, harming recreational opportunities cherished by Americans.

For the reasons set forth above, Defenders of Wildlife strongly opposes H.R. 7544.

Mr. BENTZ. Thank you. I now recognize Mr. Guardado for 5 minutes.

STATEMENT OF MAURICIO GUARDADO, GENERAL MANAGER, UNITED WATER CONSERVATION DISTRICT, OXNARD, CALIFORNIA

Mr. GUARDADO. Thank you, and good afternoon, Subcommittee Chair Bentz, Ranking Member Huffman, Committee Chair Westerman, and members of the Subcommittee. I am Mauricio Guardado, General Manager of United Water Conservation District. Thank you again for the opportunity to be here today.

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[13] *E.g.*, Sophocleous et al., *Interactions between groundwater and surface water: the state of the science*, Hydrogeology Journal, https://link.springer.com/article/10.1007/s10040-001-0170-8 ("Surface-water and groundwater ecosystems are viewed as linked components of a hydrologic continuum leading to related sustainability issues."); Brodie et al., (2007) *An overview of tools for assessing groundwater-surface water connectivity* ("Groundwater and surface water resources are hydraulically connected in many regions of Australia"); Fleckenstein et al., *Groundwater-surface water interactions: New methods and models to improve understanding of processes and dynamics*, Advances in Water Resources (2010) ("New regulations such as the EU Water Framework Directive (WFD) now call for a sustainable management of coupled ground- and surface water resources and linked ecosystems"), https://www.sciencedirect.com/science/article/abs/pii/S0309170810001739.

[14] https://insideclimatenews.org/news/31012024/nevada-supreme-court-groundwater-restrictions/

[15] https://www.fs.usda.gov/detail/r2/landmanagement/?cid=stelprdb5390116

[16] https://www.nps.gov/neri/learn/nature/hellebenders.htm

At United, a governmental agency with an elected seven-member board, we serve more than 400,000 city and county residents covering 214,000 acres in Ventura County, California. This includes the U.S. Naval Base Ventura County. United stores water at the Santa Felicia Dam and Lake Piru Reservoir and recharges groundwater aquifers through its Freeman Diversion. To mitigate seawater intrusion, United also provides water to agricultural customers, minimizing groundwater extractions near the coastline.

I am here to discuss the importance of reforming the Endangered Species Act and the accompanying legislative discussion draft to help achieve that goal.

Most agencies United works with are tough, but fair. However, the National Marine Fisheries Service, or NMFS, has used the ESA as a weapon to punish water agencies, push their political agenda, and even obstruct critical public safety projects. NMFS's practice of arbitrary decision-making, ignoring the best available science, and routinely moving goal posts are unacceptable to water entities working in good faith. NMFS has cultivated such fear that water agencies are terrified to challenge these abuses, dreading retribution from NMFS on their next permitting effort. It is either you capitulate to their demands or suffer a long, painful, and expensive process.

United's specific experiences with the ESA regulatory process offer insight into challenges faced by applicants providing critical public services. I want to talk about what is happening at the Santa Felicia Dam and the public safety improvements we desperately need.

Moving this project forward expeditiously is critical for the safety of the 400,000 people who live downstream. However, through its participation in the FERC license amendment process, NMFS is exploiting its jurisdiction under the ESA to attempt to re-initiate consultation on United's existing FERC license, delaying the project design and permitting processes.

Piru Creek is located within United's most inland region of its service area boundary. Despite NMFS characterizing the quality of habitat in Lower Piru Creek for steelhead as severely degraded and unsuitable for the rearing of juvenile steelhead, NMFS arbitrarily designated this tributary as critical habitat. NMFS did so while ignoring over a century's worth of recorded historical evidence from Federal and state biologists and other regulatory and research agencies that Piru Creek watershed is not conducive to ocean run steelhead.

NMFS ignored clear historical data, consistently dry conditions, and natural migration barriers. Not once has a single ocean-run steelhead been caught or observed in Lower Piru Creek. Despite this, NMFS still designated Lower Piru Creek as critical habitat. NMFS seemed to operate under the assumption of absence of evidence is not evidence of absence. This reality, unfortunately, NMFS's mandates, are strictly aspirational, with no practical or feasible opportunity to create any sustainable migration range.

The grand prize for having to adhere to this regulatory agency's deference? A biological opinion that has forced United Water to release over 14 billion gallons of water from our Santa Felicia Dam, much of which was released during historic drought in the region,

and spending over $10 million on studies, consultants, and legal fees. NMFS is now pushing for a fish passage system over the Santa Felicia Dam that will cost well over $100 million, though again, no ocean-run steelhead have ever been observed.

This is just one example of the challenges facing United, and I know other stakeholders are facing similar issues, as well. It is a well-worn topic of every water manager's conference in the West.

The ESA reform draft legislation before us is complementary to the recent Chevron decision, and a much-needed step to increase transparency and accountability in ESA decisions, and decrease ambiguity in ESA implementation. The addition of the definition of "habitat" and "environmental baseline" will help provide a clear interpretation for the regulated community and regulatory agency staff.

NMFS's arbitrary rulings mean that hundreds of millions of dollars and tens of thousands of acre-feet of water are lost to help a listed species that has never been concretely observed in the area. The cost to our ratepayers could add up to more than $1 billion. Unless there are changes in the ESA and overreach is reined in, NMFS will continue to exploit the law, and the result will be the cost of families, businesses, cities, and farmers we serve.

In closing, United fully supports the ESA reform draft legislation and regulatory changes that would result. We remain committed to working with your Committee and Congress. Again, thank you for the opportunity to present today.

[The prepared statement of Mr. Guardado follows:]

PREPARED STATEMENT OF MAURICIO GUARDADO, GENERAL MANAGER, UNITED WATER CONSERVATION DISTRICT

ON H.R. ____, "ESA AMENDMENTS ACT OF 2024"

Good afternoon, Subcommittee Chairman Bentz, Ranking Member Huffman and Members of the Subcommittee.

On behalf of United Water Conservation District (United), I thank you for the opportunity to present this testimony today.

My name is Mauricio Guardado. I serve as general manager of United, which covers approximately 214,000 acres in Ventura County, California and serves a population of approximately 400,000 residents including the U.S. Naval Base Ventura County, the cities of Oxnard, Port Hueneme, Ventura, Santa Paula, and Fillmore. Considered one of the prime agricultural areas of the world, the year-round growing season supports high value crops such as avocados, strawberries, lemons, raspberries, row crops and flowers.

United administers a "basin management" program for all the hydrologically connected groundwater basins within its boundaries utilizing the surface flow of the Santa Clara River and its tributaries. This program includes the capture of stormwater flows, groundwater recharge, supplemental wholesale drinking water deliveries and other water supply activities enabling beneficial use by various cities, industry, military bases, and agriculture throughout Ventura County.

United is one of California's few legislatively established Water Conservation Districts. In performing its District-wide watershed management efforts, United not only stores water at its Santa Felicia Dam and Lake Piru reservoir, it also directly recharges the groundwater aquifers via its Freeman Diversion. United also provides surface water deliveries to agricultural groundwater users to minimize groundwater extractions near the coastline in its fight to mitigate seawater intrusion from contaminating the aquifers.

I would like to focus my comments on the dire need to reform the Endangered Species Act (ESA) and the accompanying legislative discussion draft aimed at achieving that goal. United has direct and painful experience with the damage that can happen when an agency abuses the ESA for its own agenda. United's service area is home to numerous endangered species and United works collaboratively with

many federal agencies on complex permitting efforts. Agencies such as the U.S. Fish and Wildlife Service (USFWS), the U.S. Army Corps of Engineers, and the Federal Energy Regulatory Commission (FERC) are tough but fair regarding their regulatory requirements; however, time and again, the National Marine Fisheries Service (NMFS) has used the ESA as a weapon to punish water agencies for its own political agenda. NMFS arbitrary decision making, ignoring of best available science, and routine "moving of the goal posts" is unacceptable and unattainable for water entities working in good faith. NMFS has created such fear that water agencies are afraid to challenge these abuses, for fear of retribution from NMFS in their next permitting effort. For many years, NMFS has used the *Chevron* case as a shield and has boldly cited poor science for its egregious biological opinions. Now that the Supreme Court has overturned Chevron, there is an opportunity for change.

The ESA Reform draft legislation addresses definitions of habitat and baseline, incentives for the recovery of listed species, increased transparency and accountability in ESA decisions including the disclosure of data used in listing decisions, and rightfully requires limitations on overreach in mitigation requirements, all of which are critical issues for United's operations. In United's view, this legislation would improve the regulatory process by adding important clarification to the ESA, and United would like to voice our support for this important piece of legislation.

In United's experience, ambiguities under the ESA have long been exploited by federal agencies, specifically NMFS. With the United States Supreme Court's recent decision to overturn Chevron, we feel that the improvements to the ESA under the draft legislation will aid both agency interpretation and legal decisions in the future implementation of the law. United's specific experiences with the ESA regulatory process described below offer some insight into real-world implementation challenges faced by applicants, such as United, that provide critical public services.

NMFS Overreach and Impact on Santa Felicia Dam Safety Concerns

United owns and operates the Santa Felicia Dam on Piru Creek, located approximately 6 miles upstream of the confluence with the Santa Clara River. The Santa Felicia Dam was completed in 1956, and United currently operates the facility under a license from FERC. More recently, United has been designing safety improvements to its Santa Felicia Dam to replace the original outlet works that is vulnerable to damage from earthquakes, and to increase the size of its spillway to handle larger flood flows. Moving this project forward expeditiously is critical for the safety of 400,000 people who live downstream of the dam. Because of the large population below the dam, the California Division of Safety of Dams considers the Santa Felicia Dam to be an "extremely high hazard dam." While working to move forward the critical safety improvements to the dam, United has run into roadblock after roadblock by NMFS and their exploitation of the ESA. In our numerous meetings and correspondence on the project, the human safety element is never acknowledged as a consideration for NMFS.

Unfortunately, the people of Ventura County are familiar with the consequences of dam failures. In 1928, the Saint Francis Dam failed catastrophically, sending a 70-foot wave through the Santa Clara River valley, killing hundreds of downstream residents, destroying properties, and leaving extensive damage across a two-mile wide flood path. This took place in United's service area. Additionally, the community is aware of the near disastrous failure of the Lake Oroville spillway in 2017. Fortunately, both the California Division of Safety of Dams and FERC are actively engaged in United's design effort to begin construction soon. United is designing the project to address both the human safety needs and requirements of the ESA. However, NMFS is now holding the human safety project hostage and making numerous demands concerning ocean run steelhead that have never been documented at the project site. Through its participation in the FERC license amendment process, NMFS is once again exploiting its jurisdiction under the ESA to, among other things, attempt to reinitiate consultation on United's existing FERC license, which has led to delays in the project design and permitting process. For example, NMFS recently filed a motion to intervene in the FERC dam safety license amendment proceeding six years after NMFS advised the project would require formal consultation. FERC denied NMFS' motion as untimely and unjustified.

Piru Creek is Not Occupied by Ocean Run Steelhead

NMFS listed the southern California steelhead in 1997 and designated critical habitat for the species in 2005, at the time designating only "occupied" habitat and declining to designate any "unoccupied" areas as critical habitat. Effectively, by designating lower Piru Creek as critical habitat, NMFS made a determination that the reach was "occupied" by the listed unit (ocean run steelhead) at that time. Although

the ESA and its implementing regulations do not define "occupied," the Courts have interpreted this term to refer to when a species "uses [the area] with sufficient regularity that it is likely to be present during any reasonable span of time." *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010). The ESA is clear that the USFWS and NMFS must designate critical habitat based on the occupancy status as it exists at the time the species is listed. 16 U.S.C. § 1532(5)(A)(i). The designated critical habitat in lower Piru Creek was not—and still is not—occupied by ocean run steelhead and the available habitat within lower Piru Creek does not meet the intent of the ESA.

In their review of areas for designation of critical habitat, the NMFS Critical Habitat Analytical Review Team (CHARTs) report evaluated reaches at Hydrologic Unit scale. The unit that lower Piru Creek fell into also included Hopper Creek and a portion of the Santa Clara River mainstem. Hopper Creek and this portion of the SCR mainstem often run dry. Yet, NMFS designated migration, spawning, and rearing critical habitat for the entire Hydrologic Unit concluding that it contains habitat of "high conservation value" for the species. In the same year that NMFS designated critical habitat in lower Piru Creek, in correspondence related to United's FERC license, NMFS made contradictory statements about the quality of the habitat in lower Piru Creek for steelhead, including the characterization of the habitat as "severely degraded" and "unsuitable for the rearing of juvenile steelhead". Clearly, NMFS' contradictory statements exhibit the arbitrary and capricious nature of their actions in implementing the ESA, whereby NMFS has taken advantage of its jurisdiction to exert its will on the regulated community, which results in substantial costs in terms of time, money, water, resources, and person hours with no justification for the requirements being imposed.

Since the early 1900s, documentation from federal and state fish biologists and other regulatory and research agencies has stated that the Piru Creek watershed in Ventura and Los Angeles Counties is not conducive to ocean run steelhead. In fact, across the breadth of available literature, these researchers have never found ocean run steelhead in this watershed. Related to United's operation of Santa Felicia Dam, FERC submitted a Biological Assessment that supports this assertion. However, despite clear historical data, consistently dry conditions, natural migration barriers and assessments of the region, NMFS reaches a different conclusion because they like to operate under the assumption of "absence of evidence is not the evidence of absence." Not only does NMFS' Biological Opinion attest to the possibility of a steelhead resource, it also requires the construction of a very expensive fish passage structure and continuous water releases from United's infrastructure into lower Piru Creek (designated critical habitat). Again, this is for fish that have never been documented in that reach.

NMFS' assumptions are based on the false premise that historical population data is not available or is not representative of southern California steelhead. United has conducted extensive research and provided our results to NMFS numerous times in the past; however, these facts are disregarded as they do not align with NMFS's narrative about the status of the species. Historical planting of steelhead from northern California rivers is one primary example. In southern California, the rise and fall of the steelhead population directly correlates with the planting of northern steelhead in southern California waters by the California Department of Fish and Game (now the California Department of Fish and Wildlife, CDFW) beginning in the 1890s and continuing up to the 1930s. In the 1910s, southern California rivers, including the Santa Clara and Ventura, along with their tributaries, were receiving up to 3 million steelhead from northern hatcheries per year. Prior to the planting from northern hatcheries, records of steelhead in the southern California rivers are minimal. For example, records from the missionary period never mention trout or steelhead, which contrasts with the rivers further north, and scarce records from the pre-colonial period. As noted in a scholarly review of steelhead in the Santa Ynez River (the watershed with the largest presumed historical run of ocean run steelhead in the range of the listed southern California steelhead), "we found relatively few explicit records of Chumash exploitation of riverine fish, such as steelhead in the Santa Ynez River, from Spanish, Mexican, and early American explorers and settlers" and continued "the only archaeological evidence for steelhead presence comes from several theses and a museum contribution describing excavations of sites in former inland Chumash villages with associated information on the identity of fish elements . . . 6 salmonid bone elements found . . . constituted only 0.2% of the identifiable fish bones recovered at this site, with the rest assignable to marine species, and these bones appeared to come from immature steelhead or rainbow trout." Even more relevant to United's operations, in historical reviews of native American midden piles, over 152,000 fish remains were found, attributable to over 200 species of fish, and no steelhead were identified from Ventura County.

Again, the narrative pushed by NMFS of a historical run size in the tens of thousands of ocean run steelhead is not supported by the available literature and this information is simply ignored as it runs counter to NMFS' stated position.

Following issuance of NMFS' Biological Opinion, since 2010, United has released over 45,000 acre-feet of water (over 14 billion gallons) much of which was released during a historic drought in the region between 2012–2017, the replacement value of which is $22–36 million dollars. United has also spent over $10 million dollars on scientific studies, consultants, and legal fees to comply with the Biological Opinion. Ultimately, NMFS is pushing for a volitional fish passage system over Santa Felicia Dam that would cost well over $100 million dollars, and again, no ocean run steelhead have ever been observed. The requirements that United and our ratepayers are facing add up to hundreds of millions of dollars spent and tens of thousands of acre-feet of water lost to provide for a listed species that has never been observed in the affected area. Associated costs to our ratepayers could eventually add up to over a billion dollars spent. Unless there are changes to the ESA and the overreach by federal agencies is reined in, NMFS will continue to exploit the law and the result will be at the cost of rate payers.

NMFS Misinterpretation of Environmental Baseline Issues at the Freeman Diversion

Separately from our experiences at the Santa Felicia Dam, United has a long history of ESA consultation with NMFS in relation to our Freeman Diversion. The Freeman Diversion was constructed in 1991 following a decade-long project design and permitting process primarily involving the California State Water Resources Control Board and California Department of Fish and Game (now CDFW) and including input from NMFS and the USFWS. The Freeman Diversion is a surface water diversion facility utilized as the primary means to recharge the groundwater basins on the Oxnard Plain.

A fish passage facility was constructed as part of the existing facility; however, since the listing of southern California steelhead in 1997, United has been in various stages of ESA consultation with NMFS. Initially in a Section 7 consultation process with the U.S. Bureau of Reclamation (Reclamation) between 1997–2008, and currently a Section 10 consultation process that has been ongoing since 2008. With respect to southern California steelhead, NMFS' interpretation of environmental baseline in past biological opinions has effectively placed the species in a state of "baseline jeopardy". From a practical standpoint, this "baseline jeopardy" status severely limits the types of projects and activities that can receive a non-jeopardy biological opinion from NMFS. NMFS' interpretation of the ESA, primarily the environmental baseline, was the main driver in Reclamation making the determination that they could not accept or implement NMFS' biological opinion. Ultimately, Reclamation stepped away from the ESA consultation in 2008. Without a nexus to a federal agency, United has since been in the process of developing a Habitat Conservation Plan (HCP) under Section 10 of the ESA with NMFS and USFWS over the past 15+ years.

Habitat Conservation Plan Challenges

United has been working in earnest on HCP development for well over a decade and has dedicated significant staff and financial resources to moving it forward. While the USFWS has been helpful in providing their guidance throughout this process, NMFS has stifled the significant progress made on proposed infrastructure projects—including an agreement between United, NMFS, and CDFW on a $200 million dollar fish passage facility renovation project at the Freeman Diversion—due to its interpretation of environmental baseline.

Revisions to the definition of environmental baseline proposed in the ESA Reform draft legislation are necessary to clarify the intention in the ESA to separate existing facilities and ongoing operations from new or modified facilities and operations. The status of a listed species is directly related to these existing facilities and ongoing operations and these "past and present effects" are appropriately included in the environmental baseline. The implementation of new or modified facilities and operations and their respective effects on a listed species are appropriately included in the effects of the action. NMFS' interpretation and application of the environmental baseline in past Biological Opinions for United's facilities have been applied inconsistently across the west coast region. The Calaveras River HCP is one recent example. The Biological Opinion issued for the Calaveras River HCP, which notably was issued by the NMFS California Central Valley office, concludes that, regarding an existing facility undergoing proposed design modifications, "Fish passage would still be impaired . . . and the adverse impacts described would still occur." Ultimately, however, the biological opinion concludes that the "long-term beneficial effects from

the proposed action would outweigh both the short-term and long-term negative impacts" and concludes with the determination that the Calaveras River HCP is not likely to jeopardize the continued existence of the listed species at issue (California Central Valley steelhead). In United's ongoing HCP development process, the NMFS Long Beach office, which notably has never approved any HCPs, has continually utilized its jurisdiction under the ESA to impose requirements that discount or outright ignore the measurable benefits of the proposed fish passage project at the Freeman Diversion, leading to obvious inconsistencies with these other ESA consultations. To date, NMFS has not provided the scientific justification for such requirements, even after multiple requests from United for this information, leading United to develop a project and HCP under threat of denial by NMFS.

The ESA includes assurances in both Section 7 and Section 10 that require the project proponent/ applicant to improve conditions for the listed species through the implementation of a project. The current interpretation of environmental baseline by NMFS has resulted in years of delay on United's projects, and in receiving incidental take protection for our facilities. This delay has left United to face multiple third-party lawsuits, the most recent of which resulted in several additional years of delays and millions of dollars spent on legal fees. As a bright spot, through a process overseen by a federal judge, United and NMFS have agreed on a proposed project at United's Freeman Diversion to improve conditions for southern California steelhead within the Santa Clara River watershed. The project has been NMFS' preferred project for a number of years but it is significantly more costly than the other viable alternative. Nevertheless, United selected NMFS' preferred project, and along with the federal judge, all involved see this project as a huge leap forward for fish passage in the watershed. Yet, this progress has been overshadowed by NMFS' jurisdictional overreach under the ESA regarding the operation of the new facility. Although the proposed project would lead to measurable improvements to the listed species, NMFS has utilized its leverage under the ESA to refuse to acknowledge the overall benefits of the project. NMFS remains obstinate in its position and is determined to delay the project until its other demands are met.

Importance of the ESA Reform Draft Legislation

United is hopeful that the ESA Reform draft legislation can clarify some of the ambiguity in the implementation of the ESA and provide a more consistent process for applicants. In United's experience, NMFS has used their jurisdiction under the ESA as both a carrot and stick, and while we understand that NMFS will always have authority under the ESA, a more reasonable regulatory process will enable public and private entities to implement projects in a timely and cost-effective manner to benefit both the listed species and allow for important infrastructure improvements to be completed.

1. Habitat Definition

United is encouraged to see the addition of the definition of habitat as it relates to critical habitat in the ESA Reform draft legislation as this could provide a clearer interpretation for both the regulated community and the regulatory agency staff charged with implementing projects that balance our vital resources—whether they are water, land or minerals—in a way that provides a meaningful benefit to the listed species while allowing for our communities to receive what we need to be sustainable into the future. As described above, United's experience with the ESA regulatory process demonstrates that NMFS has repeatedly exploited their jurisdiction to overreach and impose arbitrary and capricious requirements that lack scientific justification. With the recent Supreme Court decision to overturn Chevron, United is hopeful that NMFS and the federal courts will implement the ESA in a more practical manner and the language proposed, and in United's view the ESA Reform draft legislation is a positive step in that direction.

2. Environmental Baseline Definition

The additions to the definition of environmental baseline would help to clarify the ESA consultation process, specifically those effects that would fall into the environmental baseline versus those that would fall into the effects of the action. United has direct experience with the need for clarification on the definition of environmental baseline, which has been inconsistently interpreted by NMFS across the west coast region, causing delay or outright stopping projects, including those that provide an overall benefit to listed species.

I also serve on the Advisory Committee for the Family Farm Alliance, which represents farmers, ranchers and water districts in 16 Western states, including California. An Alliance subcommittee was established in 2018 to provide detailed recommendations to USFWS and NMFS in July 2018 on proposed revisions to

regulations that implement portions of the ESA. Many of the important sections of the ESA Reform draft legislation we are discussing today are similar to those recommendations; the definition of "Environmental Baseline" was a top priority.

3. Title IV: Creating Greater Transparency and Accountability in Recovering Listed Species

In addition to the above remarks, United would like to voice our support for the ESA Reform draft legislation proposals to improve the transparency and accountability in recovering listed species. Regarding the availability of information related to a proposed regulation, United fully supports the intent of the ESA Reform draft legislation. In addition to a proposed regulation, the regulatory agencies, NMFS and USFWS, should provide all information that are the basis of regulatory decisions and/ or requirements under the ESA (e.g., Reasonable and Prudent Measures and Reasonable and Prudent Alternative) to improve agency and regulatory process transparency. In our experience, some of which is described in detail above, NMFS has repeatedly failed to provide adequate justification for several decisions, requirements, or recommendations, which calls into question the reasoning and appropriateness of their actions.

Related to actual observations of steelhead at United's Freeman Diversion, NMFS has failed to produce evidence requested by United on multiple occasions related to the genetics of individuals recovered by United and provided to NMFS as part of our responsible and transparent operation of our facility. NMFS has instead chosen not to reveal this information and stonewalled United's attempts to better characterize these individuals and the overall species. Through direct agency outreach and Freedom of Information Act requests, United has attempted to gain a more complete understanding of decisions issued by NMFS that have significant implications for not only the listed species but also United's facilities, our ratepayers, and the communities we serve with only limited success. With a complete understanding of the reasoning behind a decision, we would have an opportunity to develop creative multi-benefit solutions. Without a complete understanding, we are left to implement a decision, no matter how detrimental, or risk enforcement action or third-party lawsuit. Improvements in the sharing and distribution of information related to a proposed regulation—and ideally expanded to all regulatory decisions and/or requirements—would only benefit the ESA regulatory process and provide needed clarity in regulatory decisions.

4. Title V: Limitation on Reasonable and Prudent Measures

Lastly, United would also like to voice our support for the ESA Reform draft legislation proposal to add a limitation on Reasonable Prudent Measures to align with the existing language of the ESA. As noted above, United is currently in the process of developing an HCP under Section 10 of the ESA for our Freeman Diversion and anticipates entering consultation under Section 7 of the ESA for our Santa Felicia Dam Safety Improvement Project soon. Both consultation processes require United to adhere to the impact avoidance and minimization provisions set forth in the ESA, which require extensive and costly mitigation measures. Without the proposed language in the ESA Reform draft legislation, NMFS and USFWS could potentially apply additional Reasonable and Prudent Measures unilaterally in their issuance of a Biological Opinion, leading to potential permitting delays and exorbitant project costs for applicants such as United. As with many critical infrastructure projects, United's facilities are located in areas which limit design alternatives, and thus, limit the options for minimizing or offsetting impacts associated with their implementation.

Conclusion

In closing, United fully supports the ESA Reform draft legislation and the regulatory changes that would result from enacting this piece of legislation. We remain committed to working with your Committee and the Congress to share our concerns and perspectives. Thank you for this opportunity to present this testimony to you today.

Mr. BENTZ. I thank the witnesses for their testimony, and I will now recognize Members for 5 minutes each for questions.

Mr. Wittman, you are recognized for 5 minutes.

Dr. WITTMAN. Thank you, Mr. Chairman. I would like to thank our witnesses for joining us again.

Dr. Havens, thank you so much for your leadership there at VIMS. What a great family legacy. Your father, Dexter Havens, led the way in shellfish studies, and also was that true conduit to take science into the public policy realm as an advisor to governing bodies. And you are carrying his legacy on there with your Center for Coastal Studies in making sure that science makes its way into public policy. So, thank you so much for the incredible service of you and your father, for the benefit of all.

I wanted to really cut to the chase about the ACE Act. We know how important the Chesapeake Bay program is, too, where we find the Bay today. And you talked about the increasing challenge on the Bay as it receives additional pressures from population. Can you talk a little bit about how the Chesapeake Bay program itself continues to develop to make sure we are trying to stay ahead of these challenges, the watershed going from 16 to 18 million people now, and the things contained in the reauthorization act here that will not only continue, but enhance these programs that are there for the Chesapeake Bay?

Dr. HAVENS. Thank you, Congressman Wittman, but I need to make one clarification.

Dr. WITTMAN. Yes.

Dr. HAVENS. While I would like to claim Dexter Haven as my father, unfortunately, I am a Havens and he is a Haven, but he was a great legacy at VIMS.

Dr. WITTMAN. I got you. OK, well, a legacy there nonetheless.

Dr. HAVENS. Yes, thank you. And yes, the reauthorization of the ACE Act will definitely provide additional efforts, particularly on the lines of where we were really practicing learning by doing. We really want to make sure that we truly implement our lessons that we learned over these decades, and we have learned a lot.

And as you say, populations have gone from 13 million in the 1980s up to 18 million now, and that is just the human population.

Dr. WITTMAN. Yes.

Dr. HAVENS. So, there is a lot of effort that needs to go forth on truly implementing what we learn when we implement these management practices. And there is a system in place for doing that, and I think we really need to prioritize that. It is a form of accountability, which I know you are a strong proponent of.

Dr. WITTMAN. Yes.

Dr. HAVENS. And I think if we continue to move forward with that, we will be able to make this iterative progress as we go forward.

And we have made progress, and I think that that is a really big point to stress here, particularly in the case that we have had these increases, these headwinds of population growth, and urbanization, and even increased animal population. So, there are a lot of things to look positive for.

Dr. WITTMAN. Great. Let me ask, too, about the National Fish and Wildlife Foundation grants. A lot of those small grants go to many organizations throughout not just the United States, but the Chesapeake Bay. And they are really locally based. These are organizations that understand the things that could be done locally. And we know, I think, the best success that we can enjoy is when

these efforts are locally based, when you have the involvement of citizens at the local level.

Can you talk a little bit how the NFWF program has been used there in the Chesapeake Bay to do some pretty monumental things at the local level?

Dr. HAVENS. Yes, thank you.

The NFWF grants have been instrumental in bringing communities together to really look at issues that they know are important to them. And as I said in the testimony, places that people recognize that are important to them, like we talked about the Native tribes, to their culture, as well. So, the NFWF grants have been sweeping.

I mean, there have been a number of them out there, working with anything from oysters to living shoreline implementations to just working with people in the community to make sure they are educated on the issues. So, I think that that has been a critical component, and will hopefully remain so.

Dr. WITTMAN. Sure. And the other element, too, is what we do to make sure we leverage resources from all different sources, including private sources through the North American Wetlands Conservation Act.

Can you speak a little bit as to how those dollars are being used in looking at projects that really set aside these critical habitat areas, critical nesting, wintering habitat, which are also great nurseries for the things that we all enjoy in the Bay? Can you talk a little bit about how it is important to leverage the private dollars that are out there in these efforts?

Dr. HAVENS. The private dollars are exceedingly important because they provide the ability for people to be actually really committed to that activity. And as we do this and the private industries and private components come into play, we are working together, right? We are all working on this together. And I think that is the key to it. It has made a big difference, and hopefully it will continue to do so.

Dr. WITTMAN. Very good. Dr. Havens, Kirk, thanks again.

Dr. HAVENS. Thank you, Congressman.

Mr. BENTZ. The Chair recognizes Ranking Member Huffman for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman.

Anybody following this hearing has already heard my colleagues across the aisle bring up two words over and over again: "Chevron deference", and they bring it up with almost a giddiness. They are excited about the Supreme Court's new radical decision ending Chevron deference. And I just want to connect a few dots for folks watching at home in case they are wondering what does all this mean and how does it relate to the legislation before us?

There is a document out there, a 920-page manifesto from 100 conservative groups led by the Heritage Foundation, called Project 2025. People have been talking about it a lot lately. The holy grail of the right wing plans, if there is a second Trump presidency, and if my friends across the aisle have the ability to act on it, is to deconstruct the administrative state, to get rid of all of these regulations, and regulatory authority, and devolve it either over to

conservative judges or, in the case of the Endangered Species Act, to the tender mercies of a Republican Congress.

That is the exuberance that you are hearing here today as we think about this legislation before us that would, for the 87th time in this Congress, take a big bite out of the Endangered Species Act. It is right out of the Project 2025 playbook, and you don't even have to wait to find out if Donald Trump wins the election. You can see that it is already moving out right here and now in this Congress.

Ms. Richmond, you are an expert on the Endangered Species Act, so I just want to ask you because the Chairman has mentioned that it is ineffective. He has cited the recovery rate for species, but he hasn't talked about the rate at which we have kept critically endangered species from going extinct. Is the Endangered Species Act effective, and should we be looking at maybe some other metrics, as well?

Ms. RICHMOND. The Endangered Species Act is highly effective. Over 95 percent of species ever listed are still with us today.

Mr. HUFFMAN. And I want to ask you about the best scientific and commercial data available, a standard that this legislation suggests. How does this narrow and ill-vetted definition impact our ability to list and delist species under the ESA?

Ms. RICHMOND. This bill would really take a wrecking ball to the best available science standard. Under this bill, any data submitted by a state or county is automatically converted into the best available science, and that invites the overlooking of data, it invites the cherry-picking of data. And it is really antithetical to the scientific process, where skeptical peers vet each other's work to come up with the gold standard of scientific information.

Mr. HUFFMAN. So, capitalizing on this opportunity that my colleagues see in the absence of Chevron deference, they want to take away the professional judgment of agencies to look at and determine the best available independent science, and they want to substitute potentially, in some cases junk science, industry science, things that won't actually help protect fish and wildlife and other species. Is that fair to say?

Ms. RICHMOND. That is fair to say.

Mr. HUFFMAN. I want to ask about critical habitat designations, because this bill does violence to that part of the ESA, as well. Could you explain it?

Ms. RICHMOND. Yes. The bill sets up a new series of carve-outs from critical habitat that would be almost impossible to apply, requiring agencies to assess whether different plans under different sources of law are similar in nature to the Sikes Act, for instance, only one of the many hurdles they would have to jump through to carve out bits and pieces of critical habitat that can only do one thing for species, which is strip some protections away.

The other really damaging portion of this bill for critical habitat is a new definition that would exclude unoccupied critical habitat from designation, which is really devastating in a time of climate change, when an area that doesn't support a species right now, but that day may be right around the corner, would be excluded from consideration.

Mr. HUFFMAN. Thank you. Now, my colleagues continue to use words like "improve the ESA," even when they talk about a bill that does all of this damage, as you have just outlined. You are an expert on the ESA. Is there anything in this legislation that would, in your judgment, improve the ESA?

Ms. RICHMOND. No.

Mr. HUFFMAN. Mr. Guertin, we know that the voluntary conservation agreements as a way to protect species are broadly supported. They have bipartisan support. You already do a lot of them, right? But this bill contains some provisions that could actually undermine the incentives for those and the success of those. You have opposed that provision in the past. You are back re-testifying on a re-packaged attempt at the same thing. Do you still oppose it?

Mr. GUERTIN. Yes, sir.

Mr. HUFFMAN. All right. Thank you, Mr. Chairman, I yield back.

Mr. BENTZ. Chair Westerman, you are recognized for 5 minutes.

Mr. WESTERMAN. Thank you, Chairman Bentz, and thank you to the witnesses. And I find it interesting that the Federal agency and the litigants represented by the witnesses today are the ones cheering on to keep the status quo, to keep the dismal 3 percent recovery rate.

And I also found Mr. Guardado's testimony very revealing about somebody trying to provide water to California and being hamstrung by the Endangered Species Act. I know it was mentioned that 85 percent of the populace support the Endangered Species Act.

Mr. Guardado, do you think we should have an Endangered Species Act, but maybe have one that actually works?

Mr. GUARDADO. Definitely one that works. I am not an ESA expert, but I am an expert on the receiving end of arbitrary and capricious interpretations of the ESA.

I think, as far as that percentage all over the western region, many of my colleagues are experiencing the same thing, again, these just arbitrary interpretations of policy and law. And in our current situation that we have in Ventura County, that is what is happening. You have heard in my testimony we have record historical data that demonstrates that a species of ocean-run Southern California steelhead never existed, yet the regulatory agencies, because of the current state of the ESA, are able to, again, arbitrarily interpret to their political agenda. And as a result, that means less water supply, it is obstructing a public safety improvement project.

And what can be endangered are people's lives. Because if the regulatory agencies are continued to be allowed to weaponize the ESA in its current form, then if our spillway is compromised or our outlet works is compromised at the Santa Felicia Dam, people will lose their lives.

Mr. WESTERMAN. Do you think anybody can point to any success stories for endangered species based on the regulations that have been put upon you?

Mr. GUARDADO. None.

Mr. WESTERMAN. None?

Mr. GUARDADO. As a matter of fact, some could say that it could have the adverse effect for species. For example, in our Piru Creek

and many of our regions, it runs dry for many, many months of the year. And if a regulatory agency under the current ESA stipulations requires us to now move resident fish to different locations, that could have an adverse effect on the species itself.

Mr. WESTERMAN. Yes.

Mr. Guertin, states play an important role in conserving wildlife. Have any species that have been returned to state management ever declined and had to be relisted under the ESA?

Mr. GUERTIN. Not that I am aware of. No, sir.

Mr. WESTERMAN. No they haven't. Have there been species that have been delisted and returned to ESA, but not delisted by the state?

Mr. GUERTIN. Not off the top of my head. No, sir.

Mr. WESTERMAN. Well, what about the ones that have been relisted under judicial review?

Mr. GUERTIN. We have to look at those on a case-by-case basis, sir.

Mr. WESTERMAN. But there have been ones under judicial review.

Mr. GUERTIN. Yes.

Mr. WESTERMAN. Do you think litigants play a positive role or a negative role in actually recovering endangered species?

Mr. GUERTIN. I think they play an influencing role, Mr. Chairman.

Mr. WESTERMAN. Who do they influence?

Mr. GUERTIN. Either positive or negative. They try to influence on many levels. We focus on the science, sir. We try to make our——

Mr. WESTERMAN. The agencies aren't influenced by litigants?

Mr. GUERTIN. The courts make decisions, Mr. Chairman, but we then——

Mr. WESTERMAN. Which courts, the administrative courts or the article 3 courts?

Mr. GUERTIN. We have received litigation on many levels, sir, but we focus on science.

Mr. WESTERMAN. I am going to move along.

Ms. Richmond, in your disclosure statement I found it interesting that Defenders of Wildlife has received over $1.2 million in Federal grants since 2020, but only about $20,000 of that came in 2020. The other $1,192,000 has come under the Biden administration. Ninety-eight percent of the grants you listed came under the Biden administration.

But also in your disclosure, you said you are currently involved in 24 lawsuits against the Federal Government. And I found it interesting that 16 of those 24 lawsuits are against the Biden administration. Now, to the general public that might sound like you are cutting off the hand that feeds you, and they would be confused as to why would a group that gets awarded millions of dollars of grants sue the Administration that is awarding them?

Ms. RICHMOND. Sir, those issues are separate. We receive grants that we use for co-existence projects with private landowners.

Mr. WESTERMAN. Right. Do you know how much money you have received through Equal Access to Justice funds?

Ms. RICHMOND. I don't know, but I can tell you that, of those 24 lawsuits, a good number of them are either brought by other

groups that are representing us or, in some cases, they are lawsuits where we are defensive intervenors defending Federal action——

Mr. WESTERMAN. Are you familiar with the term "sue and settle?"

Ms. RICHMOND. I have heard the term.

Mr. WESTERMAN. But you all probably don't practice that, where you work with a friendly administration so you can sue them and settle, and get the law changed through lawsuits. You would probably never do that, would you?

Ms. RICHMOND. Every time you bring a lawsuit, you consider whether there is a settlement that would resolve the matter out of court and conserve court resources.

Mr. WESTERMAN. Yes, and those suits are destroying projects like Mr. Guardado is trying to get done.

I yield back.

Mr. BENTZ. Thank you. The Chair recognizes Congresswoman Porter for 5 minutes.

Ms. PORTER. This is not your grandparents' Republican party. Despite an Endangered Species Act signed by Republican President Richard Nixon, the incredible conservation efforts of President Ronald Reagan, a Californian, the modern Republican Party has set their sights on dismantling the Endangered Species Act.

President Trump's administration weakened protections for threatened and endangered species. And today, Committee Republicans want to build on that. Not on their legacy of conservation, but on their legacy of de-regulation. So, I want to focus on a specific, serious problem with the Endangered Species Amendment Act, which is what it does with regard to data collection.

Mr. Guertin, right now the Fish and Wildlife Service makes decisions about listing and delisting species as endangered by using the best scientific and commercial data available, is that correct?

Mr. GUERTIN. Yes, Congresswoman.

Ms. PORTER. Are there any limits on the data you can use, other than the vetting of it for reliability, soundness?

Mr. GUERTIN. Congresswoman, we solicit input from every entity in the United States: state fish and game, tribal fish and game, universities. NGOs have some, landowners, military, industry. We are desperately looking for the best available information at the moment in time.

Ms. PORTER. I think that is impressive, being willing to look and listen to all kinds of people and all kinds of entities, including our states, as you mentioned, non-profit organizations, higher education, researchers, landowners. But under this bill, what Republicans would do is introduce a new, narrow, and anti-science definition of best available data. It would only allow fish and wildlife to use data submitted by states, tribes, and county governments.

Now, I have no problem with the data that comes from those three entities. I think it is often valuable. But why exclude reliable, trustworthy scientific data? How about data from the Federal Government or professors and researchers? Zoos? Non-profits?

Mr. Guertin, what scientific basis is there to exclude some of that data, categorically, based on where it is coming from rather than the quality, which I assume is always a concern?

Mr. GUERTIN. Congresswoman, we welcome the robust output from all of academia and industry, the agencies, both Federal and state, USGS, NOAA, state fish and game agencies, tribal partners. It adds to the thoroughness of the information we can evaluate, and it adds to the strength of the decisions we can make, and it adds to the defensibility of these decisions because it is based on the best available commercial and scientific information.

Ms. PORTER. Let's look real quickly at a specific example. Right now, there is a lawsuit in Federal court seeking to restore protections for gray wolves in Montana and Idaho. And that lawsuit claims that not only have these policies put the wolves in these states on a path to near extinction, but that both states, Montana and Idaho, the lawsuit alleges, have used faulty, if not bogus data to justify their wildlife management plans.

Now, in fact, your own agency admitted that the way Montana and Idaho are collecting data is "at odds with modern professional wildlife management." Mr. Guertin, what happens to the gray wolf population when we rely on faulty data? What is at risk here?

Mr. GUERTIN. I believe you are referring to our recently-concluded status review of wolves in the northern Rocky Mountains. We, after a thorough evaluation of all of the information, scientific, available to us, determined that while there were concerns with the regulatory mechanisms in those two range states, that the population of wolves was expanding, that the population of wolves was stable, and we relied on that science to make a determination to leave them delisted. That speaks to the richness of this process, and speaks to us relying on science to drive these determinations.

Ms. PORTER. So, for example, would you find it helpful to rely on a recent report from the University of Montana Bozeman, which examined the methods being used in Idaho and Montana to count the gray wolf population so that you can assess whether these management plans are good or bad?

Mr. GUERTIN. We will continue to look at all of the information coming in. Our job is to synthesize it, evaluate it, make sure it has been peer reviewed, and then compare it with the data points we have and make the agency determination.

Ms. PORTER. Mr. Guertin, if this bill passed, could you consider evidence like that report from the University of Montana?

Mr. GUERTIN. Of course, we would look at a report from a university——

Ms. PORTER. If this bill passed, could you?

Mr. GUERTIN. If the bill passed, no. On the current definition, no.

Ms. PORTER. If this bill passed, you could not use that data.

So, I think the idea here is we want states to use their tools, and that is important, and tribes and county governments. But we shouldn't be excluding valid scientific data from consideration. What if it came from a local government, rather than a county government? What if it came from an educational institution, rather than a tribal organization? What if it came from a conservation organization like the zoo, rather than from the states?

I think we want to make sure we have the best available data to let you do your work.

I yield back.

Mr. BENTZ. The Chair recognizes Congresswoman Hageman for 5 minutes.

Ms. HAGEMAN. Thank you, Mr. Chairman.

Mr. Guertin, does ongoing litigation impact the Fish and Wildlife Service's ability to perform its duties?

Mr. GUERTIN. It can have an impact on our ability to perform our duties. Yes, Congresswoman.

Ms. HAGEMAN. OK, and could the time and money that is currently being spent on countless lawsuits filed by activist groups and paying them lucrative attorney's fees be better spent on species recovery?

Mr. GUERTIN. Congresswoman, we each year develop work plans, and set priorities, and align the available staff against them. We focus the best we can on mission-essential work. We certainly have to have a few people working on the litigation workload, as well.

Ms. HAGEMAN. Well, litigation impacts your ability to actually focus on species recovery.

I mean, I have had that experience in working with Fish and——

Mr. GUERTIN. It can. Yes, ma'am.

Ms. HAGEMAN. That is fair to say, isn't it?

Mr. GUERTIN. Yes, ma'am. It is.

Ms. HAGEMAN. OK. And Ms. Richmond, in your testimony you have mentioned the fact that, "The ESA recognizes that timely listing of species is important to achieving the goals of the Act." And for that reason, the Act imposes a 12-month deadline for listing decisions. It also imposes a 12-month deadline for delisting decisions. Isn't that true?

Ms. RICHMOND. The 12-month deadline for delisting decisions?

Ms. HAGEMAN. Yes, there is a 12-month deadline any time a petition is filed with the Fish and Wildlife Service for either listing or delisting. Correct?

Ms. RICHMOND. Correct.

Ms. HAGEMAN. OK. And can you think of any instances where the Fish and Wildlife Service actually complied with that 12-month deadline?

Ms. RICHMOND. Those deadlines are often honored in the breach for both listing and delisting decisions.

Ms. HAGEMAN. Yes, it doesn't happen very often, does it?

Ms. RICHMOND. But it has happened, certainly. But more often than not it is exceeded.

Ms. HAGEMAN. Well, I will give you our personal experience in Wyoming. The state of Wyoming filed a petition for judicial review in the Wyoming Federal District Court, alleging that the Department of the Interior and the Fish and Wildlife Service failed to meet the 12-month deadline for responding to Wyoming's petition to delist the grizzly bear population in the Greater Yellowstone Ecosystem.

Now, the Greater Yellowstone grizzly bear has fully recovered for over two decades. They have been delisted and relisted twice, in part because radical environmental groups forum shop for activist judges. Stated another way, the Greater Yellowstone grizzly bear is fully recovered and has been for over 20 years.

Wyoming has a viable grizzly bear management plan in place to protect the recovered population. Yet, because of weaknesses in the

ESA they remain listed, thereby making it so that the Fish and Wildlife Service is actually deflecting resources away from species that we actually need to protect as they continue to manage the grizzly bear as a listed species.

Deputy Director Guertin, I recently wrote a letter to the Fish and Wildlife Service requesting that it release the 12-month review no later than June 15. And obviously, that date has come and gone. You have already exceeded the 12-month deadline related to Wyoming's petition to delist. We know that we have a viable grizzly bear management plan in place. We know that the grizzly bear population is more than double what the recovery plan requires. And we also know that we have sufficient habitat for the grizzly bear.

Why hasn't this 12-month review related to Wyoming's petition been released?

Mr. GUERTIN. Thank you for your question, Congressman. Just for clarification, we acknowledge the grizzly bear has exceeded its numerical delisting goal. There are 965 bears as the last population——

Ms. HAGEMAN. Well, there are more than that, but go ahead.

Mr. GUERTIN. The goal was 600. We acknowledge that. But as you are aware, to make that determination we do the five-factor analysis. That is the time——

Ms. HAGEMAN. When are you going to finish it?

Mr. GUERTIN. We are planning to publish a 12-month finding by the end of this month, Congresswoman.

Ms. HAGEMAN. So, by the end of July we are going to have the——

Mr. GUERTIN. July 31, 2024.

Ms. HAGEMAN. By the end of this month we are going to have the response to the state of Wyoming's petition to delist the grizzly bear.

Mr. GUERTIN. Yes, ma'am.

Ms. HAGEMAN. Thank you. That is wonderful.

If the judicial review provision in Mr. Westerman's bill were in place when the bear was actually delisted, it would still be delisted today, wouldn't it?

Because of the 5-year protection against judicial review that would allow the delisting to go forward, and then we would be able to observe that species for a 5-year period before an activist group such as the Defenders of Wildlife that makes millions and millions and millions of dollars off of the Federal Government, that 5-year period of time would still be in place. Is that correct?

Mr. GUERTIN. Congresswoman, I would have to answer that for the record for you. I don't want to give you an incorrect answer.

Ms. HAGEMAN. OK, Mr. Guertin, considering the fact that we have over 1,100 grizzly bears in Wyoming, which, again, is more than double the recovery goals, it is fair to say that if the grizzly bear were petitioned to be listed under the normal ESA process today it wouldn't be listed at all, would it?

Mr. GUERTIN. Under that hypothetical, given the current situation, probably not. No, Congresswoman.

Ms. HAGEMAN. Thank you. I have no further questions. I yield back.

Mr. BENTZ. Chair recognizes Mr. Mullin for 5 minutes.

Mr. MULLIN. Thank you, Mr. Chair. I ask unanimous consent that Representative Harder of California and Representative Beyer of Virginia be allowed to sit on the dais and participate in today's hearing.

Mr. BENTZ. Without objection.

Mr. MULLIN. Thank you, sir, and thank you all for your testimony.

Mr. Guertin, can you tell us how this bill would limit your agency's ability to account for climate change when designating critical habitat, and what repercussions this might have for threatened and endangered species?

Mr. GUERTIN. Thank you for your question, Congressman.

When we have looked at the draft discussion draft that we are talking about today, I think the underlying concern we have comes back to the definition of habitat that underlies a lot of what the legislation might be going after. And we have put in place a regulation that gives the agency flexibility to determine habitat going forward in response to stressors like climate change.

The legislation would restore a previous definition that set habitat at that moment in time. The issue for us is animals move. It is called a range shift. And we have learned that, and I learned it personally in my experience in region 6, working with wolverine and pikas and other critters, they move over time. So, we want to have that flexibility built in to our processes going forward to be able to respond to where the animals might be 10 or 15 years from now.

Mr. MULLIN. One of the stated purposes in the title of the bill is to increase transparency and accountability. But another section of the bill removes the ability for judicial review of delisting decisions. My question is for Ms. Richmond.

Does this increase transparency and accountability, in your estimation?

Ms. RICHMOND. No, sir. It does the opposite. And, in fact, a pause on judicial review of 5 years could be the pause that takes a species back towards extinction with no ability to challenge the delisting. Justice deferred can be justice denied.

Mr. MULLIN. Thank you for that.

I yield back.

Mr. BENTZ. The Chair recognizes Congresswoman Kiggans for 5 minutes.

Mrs. KIGGANS. Thank you, Mr. Chair. I just wanted to take my time today to discuss America's Conservation and Enhancement Act, which I am proud to co-lead with my friend and colleague, Mr. Wittman. Among other great initiatives, this bill reauthorizes the Chesapeake Bay Program, a regional partnership focused on restoring and protecting this critical natural resource.

My constituents in Virginia's 2nd District live, work, and play in and around the Chesapeake Bay, making this legislation vital to their everyday lives. I have a question just for Mr. Havens, with us from VIMS that I had the pleasure of touring not too long ago on the Eastern Shore, and just to see some of the great research work that was being done there on not just about the water quality in the Bay, but the oyster and shellfish farming. And it was just

really fascinating to hear about the projects and, again, the research that is being done there.

Mr. Havens, can you take just a few minutes and describe some of this progress that has already been achieved in preserving and restoring the Chesapeake Bay ecosystem, and what future work needs to be done to protect this resource?

Dr. HAVENS. Thank you, Congresswoman.

Yes, there has been progress, in particular in the efforts of trying to restore oyster populations, as well as bringing back certain habitats that have been devoid of, like, oxygen, raising the oxygen levels in these habitats. And there has been a significant amount of work in reducing the emission of nutrients coming from, like, wastewater treatment plants. That has been a big, big reduction over time in the Chesapeake Bay. So, there are a lot of successes in areas that we can point to, but there is still a lot of work to do. It is a 64,000-square-mile watershed with 18 million people in it.

And one of the avenues to continue to work in that realm is to, again, concentrate on where it matters most for the people. So, there has been an interest to shift toward really working on the shallow water areas, where people live and recreate, and where they can see the progress relatively quickly, as compared to some of the deep water areas, as well.

And part of that is also this issue of trying to continually learn while we are doing, learn and take lessons from what we tried. So, if we try some management actions and they don't work, we need to have the ability to adapt and make those changes, so that we can continue to move forward and make that progress. And there is a process in place to do that, to track those management actions. And I think we just need to continue to prioritize that effort so that we are always making forward progress.

Mrs. KIGGANS. Thank you. And I know in Hampton Roads, we enjoy culinary dishes that include a lot of those shellfish, so I just think it is a very relevant topic when we are discussing this. We are very proud of the product that comes out of the Bay in that regard.

But do you get state funding at all for any of the VIMS initiatives in research?

Dr. HAVENS. Oh, yes. I do believe we do, yes.

Mrs. KIGGANS. Do you?

Dr. HAVENS. Yes.

Mrs. KIGGANS. OK, so how else can we help from our level, from Congress, just to work with VIMS? What is it that you all need that we can provide on our level to improve the Chesapeake Bay Program?

Dr. HAVENS. I think just your attention to the issue, which you have done here with Congressman Wittman, is vitally important. And any time we can actually host you and your staff coming down, and any of the Committee members, we would be extremely happy to do so. And I think just raising awareness and helping us educate people about the importance of the Chesapeake Bay and the work that is being done there, I think that is a very vital aspect that we would really appreciate.

Mrs. KIGGANS. I echo that sentiment.

Dr. HAVENS. And I would love to be able to continue the conversations.

Mrs. KIGGANS. Yes, I agree, we invite everyone to come visit.

Dr. HAVENS. Yes, come.

Mrs. KIGGANS. It is a great place to visit and to live.

Mr. Havens, one last question to you. Can you tell us about the 10 goals outlined in the Chesapeake Bay Watershed Agreement, and how this legislation moves us closer to accomplishing those goals?

Dr. HAVENS. Yes, as we continue to work through that, there are a number of goals, and these goals have particular outcomes that are developed. I think there are 30-some outcomes or something along those lines.

And it is important that we continue to look at that, and make that progress, and look at the actual outcomes, how we are developing those. And part of that is making sure that we include a lot of stakeholders in that decision-making on what are the outcomes that we are looking for, envisioning a future Chesapeake Bay. And that is why part of my testimony talks about making sure that we are engaging the Tribal Nations in the watershed, as well, because we can learn from their past experience and stewardship of that area, from education to water quality goals to living resource restoration, all of those activities.

And I know that you are also familiar with the issues of trying to build living shorelines along our shorelines to help deal with sea level rise and the loss of our wetland resources. There are a number of important goals and outcomes that we want to look for.

Mrs. KIGGANS. Great. Let me know specifically how I can be helpful, but I appreciate all that you do. Thank you.

I yield back.

Dr. HAVENS. Thank you.

Mr. BENTZ. The Chair recognizes Mr. Beyer for 5 minutes.

Mr. BEYER. Mr. Chairman, thank you very much for allowing me to waive on, and thank all of you for being here.

And Dr. Havens, nice to shout out a Virginian from Gloucester Point. We Virginians have to stick together. And we love the Bay.

I had the pleasure of working with the late American biologist E.O. Wilson, a wonderful guy. We have been working for years on the wildlife corridors bill, now co-sponsored with Ryan Zinke, who I believe is on this Committee right now, too. And he deeply believes that all life depends on our essential ecosystems, and that when we damage these ecosystems it will have a profound impact on our biodiversity crisis. Between 1970 and 2018, there was an average of a 69 percent decrease in population sizes of mammals, birds, amphibians, fish, and reptiles for many, many different reasons. His last book was entitled, "Half Earth," and we have a very worthwhile House Joint Resolution entitled just that, Half Earth, which we are trying to get lots of people to sign on to.

Ms. Richmond, I was pleased to read in your testimony that you specifically shouted out biodiversity as the key to human survival. Can you elaborate on how the Westerman bill specifically might undermine the core values of the bipartisan ESA Act of 1973?

Ms. RICHMOND. I would be happy to. So, the Westerman bill would do several damaging things to our national commitment to

prevent extinction and promote biodiversity. One of the worst of those would be the dismantling of protections for threatened species. Threatened species for decades have been extended protections against take that are automatic for endangered species. And these threatened species include some of our nation's most iconic wildlife: polar bears, manatees, piping plovers.

Under this bill, to protect those species against being taken, being killed or injured, you would have to first do recovery planning as part of even putting those initial protections into place. That puts the cart before the horse, and exposes those threatened species to lots more take that could decrease their numbers. It is also wildly inefficient because you want to keep a species vibrant, not let it go downhill and then have to work even harder to recover it.

Some of the other damaging provisions include making voluntary conservation less effective by removing guardrails for those agreements, and stripping away the ability of the agencies to designate unoccupied habitat that species may desperately need right around the corner to adapt to climate change.

Mr. BEYER. Can you get another sentence or two on why we would protect unoccupied habitat?

Ms. RICHMOND. We protect unoccupied habitat because, even if a species isn't using an area right now, it may very well have used that area historically, so protecting that habitat allows the species to expand and recover.

Also, as Mr. Guertin mentioned, sometimes as the climate warms, species need to move up slope. They need to move north to be able to adapt and survive. And if you can't protect that habitat, there may be nowhere for those species like the pika to go.

Mr. BEYER. Chairman Westerman's bill creates this 12-year deadline for species listing under the ESA. What does this imply? When you try to recover it, what does a slow listing decision suggest is going to happen?

Ms. RICHMOND. If a species has to wait in line even to get protections, it is going to continue to decline further. If you think about some of our most iconic species, like the California condor, these were species that were really on the brink when they were first listed. Species may not be able to wait 12 years, and there has to be an ability to accelerate that process in the event of a rapid decline.

Mr. BEYER. Just one last question for you. The bill limits the species that can qualify for the candidate conservation agreements with assurances, the CCAA.

Ms. RICHMOND. Correct.

Mr. BEYER. Again, what is the idea behind limiting those?

Ms. RICHMOND. The idea is to constrict the scope of voluntary conservation. That is what the bill would do. It would remove the ability that exists under current regulations for those agreements to protect a broader suite of species, and that is just not good for anyone.

Mr. BEYER. I agree, thank you very much.

Mr. Chairman, I yield back.

Mr. BENTZ. Mr. Graves, you are recognized for 5 minutes.

Mr. GRAVES. Thank you, Mr. Chairman. I yield as much time as he may consume to the Chairman of the Full Committee, Mr. Westerman.

Mr. WESTERMAN. Thank you, Mr. Graves, and I won't take all of your time, but I appreciate you yielding.

And normally I chalk things up to Reagan's old saying that it is not that our liberal friends are ignorant, they just know so much about what isn't so, and I let a lot of things go. But I have heard over and over from the other side of the dais about how this bill prohibits scientific data from being used, and I thought that was pretty bold of them to try to do that, but then to see a couple of our witnesses from the Federal Government and a litigant try to confirm that, and in Section 2 on page 33 of the bill it says, "The term best, scientific and commercial data available, includes all such data submitted to the Secretary by a state, tribal, or a county government."

So, what we have right now is an agency that excludes data, case in point, your red snapper, Mr. Graves. There is some great work being done by universities counting snapper, but NOAA refuses to accept their data.

So, what we are trying to do in the bill is actually make more scientific data available, not reduce the amount of data that is available, and that is a terrible misreading of the bill, and it is just trying to create a political wedge in saying that Republicans deny science, when actually my friends are masters at taking their own actions and trying to project them on our side of the aisle.

I yield back to Mr. Graves.

Mr. GRAVES. Thank you, Mr. Chairman.

Mr. Guertin, I want to thank you for coming back here. I think the last time you were here I may or may not have referred to you as a sacrificial lamb, and I think I might have asked you why you love nutria. I do just want to thank you and your testimony for your support of the nutria eradication bill that Congressman Harder has introduced. I think that, as you indicated, it has had a positive impact.

In my home state of Louisiana, we have attributed 102,000 acres of land loss to nutria. Incredibly, a dangerous invasive species not only impacting our coastal wetland habitat, which is incredibly ecologically productive, but also causing major damages to our infrastructure, such as levees that are important for our resiliency of communities in South Louisiana, an important program. We run a bounty program and it has been successful, but we must reauthorize this bill I want to thank Congressman Harder for introducing, and I appreciate you being here and appreciate your support of the legislation.

I did want to ask Mr. Guertin, in regard to NAWCA, NAWCA has been an incredibly successful program. As you know, Louisiana is one of the largest wintering habitat for migratory waterfowl. You also may know that we are losing a football field of land which are coastal wetlands about every 90 minutes in our state.

It is disappointing to see that you are supportive of NAWCA, that NAWCA has been such a successful bipartisan program, yet the Administration has come in and slashed the appropriations for the program and, adding insult to injury, increasing your adminis-

trative component, meaning taking more of the funds for administrative costs. Could you help me understand why you would be cutting a successful program and increasing your administrative percentage?

Mr. GUERTIN. Thank you, Congressman. Sure. Just for presentation purposes and to clarify for your background and understanding, when the Administration prepared the President's budget request, I came up here to Congress. We looked at the totality of funding, which was the appropriated dollars, funding that comes to the account from the Sport Fish Restoration, and interest carried forward from Pittman-Robertson sale of firearms. It totals up to over $130 million in totality.

We recognize the request thus shows a decrease, but we point everyone to the totality of funding, and also in the recently released House mark for appropriations for Interior this coming cycle. The House restores the appropriate amount. That would bring it up to an even higher level.

But it was just evaluating the totality of funding for a very successful program that we continue to support.

Mr. GRAVES. All right. I will take that as a I love it and we are not going to do that again. Thanks.

I just have a few seconds left. Ms. Richmond, just a quick question in regard to a take. Would someone catching a sea turtle be considered a take?

Ms. RICHMOND. Yes.

Mr. GRAVES. What about driving their boat near them?

Ms. RICHMOND. It depends on the effect on the sea turtle.

Mr. GRAVES. But that could be considered a take.

Ms. RICHMOND. It could be.

Mr. GRAVES. Yes.

Ms. RICHMOND. And if someone is shining a light on the beach when the sea turtles are there, could that be considered a take or harassment?

Ms. RICHMOND. Depending on the circumstances.

Mr. GRAVES. But it is possible?

Ms. RICHMOND. It is possible.

Mr. GRAVES. And if we are carrying out a coastal restoration project, but the project for ecological restoration impacts vegetation that sea turtles consume, could that be considered a take, as well?

Ms. RICHMOND. They would probably seek a permit for such a project from the Fish and Wildlife Service or from NMFS.

Mr. GRAVES. A take permit.

Ms. RICHMOND. Correct.

Mr. GRAVES. Yes, OK. All right, thanks. I just want to make sure I understood those things.

Thank you, Mr. Chairman. I yield back.

Mr. BENTZ. The Chair recognizes Mr. LaMalfa for 5 minutes.

Mr. LAMALFA. Thank you, Mr. Chairman.

An experience we had in my district was a very important levee project. One of the small towns was built along the river. The levees were soft, they were old, they needed repairs in order to keep the town safe. And it was a very active river. You could get some pretty high flows. There were several times where they had 24-hour watches, late, late, all night long on these levees, and

bringing equipment in to try to dump extra riprap or whatever in emergency conditions on soft levees at night, et cetera, while it is raining because they couldn't accomplish fixing the levees reasonably or timely during the summer months because it has to be done in an emergency to get an exemption, for example.

So, if you try to go through the process of just doing it straight up, cheaper, safer, and in the right time of year, they said, "oh, you have a species issue." In this case here, it was the great northern valley elderberry beetle. And the issue there was it was somehow listed as an endangered species.

So, after some years of that, the U.S. Fish and Wildlife finally recommended they remove it from the list. And they go through their process on that. In the meantime, the town needs their levee fixed. In order to do so, they have to actually move the levee, and they do a setback which wiped out somewhere around 70 to 100 acres of, I believe, almond or walnut orchards on private land so they could create habitat for the elderberry bush so that the beetle could be in the bush.

The problem is their surveys showed that there never was a beetle in that area. OK, yes, the elderberry bushes grow, but they don't all necessarily host beetles. So, in this case here they had to go through all the hoops, buying this land, taking years worth of permits and process to build this levee setback, taking land out of production, out of tax base because of a beetle that didn't exist, that the survey showed wasn't there. But because it was deemed critical habitat they thought, well, because we are going to disturb a small amount of bushes on a man-made levee where these bushes adapted to, we are going to have to go, I think it was a 70-to-1 ratio of replacing those bushes out here in this formerly orchard land.

And it took many extra years for this levee to be built. All the while, the town is in peril of the next extra high flow coming down the river and wiping out their levee and wiping out the town. It took 10 extra years, at least, and much more cost to do so, because the concept of there might be a beetle that may come along traveling south to Disneyland or whatever to sit in that bush, even though there is no record of it.

So, what Mr. Westerman is trying to do in the bill on revising the thoughts on critical habitat a little bit sure makes a lot of sense for public safety, for people with future levee projects. They had to secure tens of millions of grants and other outside money to do a project which would have been really simple, had they just been able to bolster the original levee.

So, what do you tell those folks of that town? What do you tell people everywhere that are endangered, basically, for when the river might come over the top any given year? And it came close several times. I have stood out with the sheriff on that levee, I think it was on New Year's Eve one year, as they were endangering truckers and people trying to bring riprap in to do the soft spots on the levees here. But no, we turned a blind eye to that with this regulation that says, well, this could be critical habitat, possibly, for something that doesn't exist in that particular area. That is how tone deaf these regulations are, and that is why Mr. Westerman's bill is, and I know these evolved over time. These are

50-year-old regulations, and court cases, and bureaucracies that have been stocked with more and more people that only believe in this instead of a balanced approach. So, this is a necessary realignment to reality of what Mr. Westerman is trying to accomplish here.

Mr. Guardado, would you touch on that for a moment here? Because I know you have some challenges down your way.

Mr. GUARDADO. Yes, absolutely. The necessity to be more specific on these definitions and fortify the policy is absolutely critical because, much like that example, we have a public safety project at the Santa Felicia Dam that is mandated that we perform these improvements through increasing our spillway capacity and outlet works.

And, again, we have heard best available science, and we agree, let's use the best available science, but let's also hold the regulatory agencies accountable to show their work. Despite, again, historical records where a particular species did not exist, we still have to spend tens of millions of dollars in analysis, despite numerous stream surveys, numerous snorkel surveys, all of the historical data, all the best available science that has been ignored, and many attempts to try to understand the regulatory agencies' design criteria through Freedom of Information Act requests with little effect. Documents we get back are either retracted, marked out, but yet the determinations and decisions are still made.

So, for us, we are still in the process. We are still trying to get through this major regulatory hurdle. Meanwhile, approximately 400,000 people downstream——

Mr. LAMALFA. Major cost and major loss of time with those people being subject to a situation that could be improved vastly with this infrastructure improvement and the safety from it.

Mr. GUARDADO. That is correct.

Mr. LAMALFA. So, unnecessary risk, unnecessary cost.

Mr. GUARDADO. Unnecessary cost, and it continues to put us in such a liability stage to incur even more.

Mr. LAMALFA. Well, maybe the people in the government will be the ones who get sued, because you guys are trying to do your job, should something go wrong.

I yield back, Mr. Chairman.

Mr. BENTZ. The Chair recognizes Congresswoman Maloy for 5 minutes.

Ms. MALOY. Thank you, Mr. Chairman. I came here to talk water, and now we get to talk about water and the proper role of government that today just keeps getting better and better.

I want to start with recognizing that the Ranking Member was correct. I am a Republican lawmaker who is giddy about Chevron being overturned. And one of the reasons is because I am giddy to see executive branch agencies respect Congress' oversight authority again. And I am giddy about representing the people in Utah's 2nd Congressional District while we try to restore this balance of power between the branches of government, and overturning Chevron is a good step in that direction.

Dr. Steed, thank you for being here. We have known each other for a lot of years. Just in case you don't remember, I am going to remind you how we first got to know each other. You were a Chief

of Staff for Congressman Chris Stewart. I was a Deputy County Attorney in southern Utah, and we were working together on a land plan out of the Bureau of Land Management in southern Utah that was overreaching its authority. In fact, one of the many things in that plan that we worked on was that the Bureau of Land Management was claiming that they could claim water rights on land in southern Utah, where it is very hot, very arid, and water is our most limiting factor. That is not even a question. Do you remember that?

Dr. STEED. I do, yes.

Ms. MALOY. OK, so now it feels like we have come full circle that I am sitting up here and you are sitting down there, and once again we are talking about water rights and the Federal Government's role. We both testified about this already, but I just want to make sure we put a really fine point on what we are doing, because it is about the proper roles of government. And in all of this discussion of a post-Chevron world, it matters.

Who has jurisdiction over water in the state of Utah?

Dr. STEED. The state of Utah has jurisdiction over water. As for the rest of the West, it is state jurisdiction.

Ms. MALOY. Yes. And do you have faith that the state of Utah can manage its water and allocate and adjudicate its water without the help of the Federal Government?

Dr. STEED. Yes.

Ms. MALOY. Yes, so do I. But we have this problem reoccurring all the time in Utah because the Federal Government manages so many of our resources that everybody gets used to deferring to agencies when it comes to resource management. That has crept into water policy and water law, too. Wouldn't you agree?

Dr. STEED. Absolutely, yes.

Ms. MALOY. So, what we are doing here, as the legislative branch, is clarifying that states have jurisdiction over water, and that executive branch agencies can't just assume jurisdiction over water because they exist.

And you testified about attempts by the Federal Government to claim water rights. I also did. But the jurisdiction lies with the state. Has the state passed any legislation regarding this?

Dr. STEED. Yes, I mean, the state of Utah has been quite concerned about this behavior for some time. It has passed legislation to say, essentially, that, yes, it is illegal in Utah for a Federal agency to require a transfer of water rights in pursuit of a Federal permit, and I think that is something that is a good safeguard.

As I mentioned during my testimony, Federal permits are incredibly important for economic development in a state where you have 63 percent of the land owned by the Federal Government. That also puts the Federal Government with an extraordinary amount of power in deciding what happens on that land. And I don't want to say that it is extortionary, but it is. There is an imbalance of power. It is important that we recognize that that water right shouldn't get in the way of that, that we should keep it in the lanes of land management and the authority over water rights.

Ms. MALOY. Yes, federalism matters. The states should have jurisdiction over the things they have jurisdiction over. The Federal Government should stay out of it.

When I was a Deputy County Attorney, I had conversations with other lawyers in the state of Utah who were afraid that that state law was not something they would ever be able to enforce because the Federal Government just wouldn't recognize it.

So, we have had a discussion about the Chevron Doctrine and the separation of powers between the branches. It is also important that we recognize the separation of powers between the state and the Federal Government. And what I am doing with this bill is making sure that it is clear that Congress does not intend for executive branch agencies to be able to step on states' authority and assume jurisdiction over water that they don't have.

Thank you for being here. Thank you for testifying. I am glad we are still fighting the good fight on federalism and separation of powers and water.

With that, Mr. Chairman, I yield back.

Mr. BENTZ. The Chair recognizes himself for 5 minutes.

Mr. Guardado, I was looking at your testimony with considerable interest, and I am anxious for you to explain what you mean by "baseline jeopardy." What do you mean by that?

Mr. GUARDADO. Well, currently, for example, at a Freeman Diversion, we have an existing fish passage structure. We have video and all kinds of measuring devices to show fish passing through that facility. Yet, it was deemed not optimal, and it is not optimal in that United Water Conservation District didn't provide the design criteria for that fish passage structure, the regulatory agencies did. Now they deem it not optimal, and want us to actually construct a new $200 million fish passage structure.

Mr. BENTZ. Let's stop there because you are going to lose a lot of people along the way. I am still not sure I am clear on it.

But what you were supposed to do, because you wanted to do something small let's say, is that under the new rules you had to take into account the entire project, every activity you are currently engaging in, not just the small thing you proposed to do.

Mr. GUARDADO. Not just the small thing.

Mr. BENTZ. So, what happened is, by you proposing to do a small thing, under the current rules you opened the door to the entire project, thus enabling NMFS to demand that you spend $200 million instead of $5 million or $2 million. Is that correct?

Mr. GUARDADO. As far as the cost, as far as what the alternatives were, it would still be estimated. But yes, as far as that condition, that is what exists at this point.

Mr. BENTZ. But the point is that you were trying to do a small improvement, and NMFS came in and said, "We are not going to look at just the jeopardy created by the small improvement. Because of the way the rules are now written under the Biden administration, we can look at the entire impact of the entire diversion structure." Thus, they say, because you want to do a little thing, you must put fish passage in, or spend $200 million instead of $5 million or $2 million or whatever it is.

What am I trying to get at here is no longer can you do a small thing to improve it, because you have thrown the door open for NMFS to say you have to change everything the way we want you to change it before we are going to allow it. Is that what you meant by baseline jeopardy?

Mr. GUARDADO. That is correct. And not looking at the total picture of what exists today, and not even considering any of these smaller operational adjustments as part of improving the landscape. Everything has to take a whole new look, and the design criteria is cherry-picked to their agenda.

Mr. BENTZ. Yes, and what happens, it is a never-ending process. You can never get away from it.

We saw the same thing up in Oregon when we tried to do, for example, a power generating device on an existing hydro structure. Suddenly, before we could put the power generating device on the existing structure at a small cost, they wanted the folks in charge, every type of additional fish thing you can imagine, none of which anybody could afford, and thus nothing happened.

And now, Chair Westerman's bill takes us back to the point where we were prior to this rule being put in place by the Biden administration and says, look, if you want to do this thing, whatever it is, this activity, we are merely going to ask that you measure the damage it, that small activity, would do to the fish. I am skipping over all the proper jargon, but is that correct?

Mr. GUARDADO. The way the current baseline is determined and the way they issue the jeopardy biological opinions makes it virtually impossible to attain.

Mr. BENTZ. Of course, because you would have to go back and take out dams or whatever NMFS might tell you to do.

Mr. GUARDADO. Correct.

Mr. BENTZ. I want to shift to Mr. Guertin for a minute.

Mr. Guertin, on page 34 of Mr. Westerman's bill, there is a requirement that a report be filed showing how much money and how much litigation is being engaged in. And my question to you is, is this information now available, in Section 403, "Disclosure of Expenditures under Endangered Species Act," and then, under Section 13 it walks through what the Secretary of the Interior shall disclose. Is this currently hidden? Can we get our hands on that now?

Mr. GUERTIN. Mr. Chairman, our read of the requirements in there, I believe most of that information is available. We should be able to provide it.

Mr. BENTZ. OK, but let me just stop right there. Can we ask how much the Defenders of Wildlife received under the Access to Justice Act? Can we get that information today?

Mr. GUERTIN. Probably not, sir, because most of it has been settled by a confidential settlement.

Mr. BENTZ. Oh, confidential? Let me hear that a little louder. Settled, hidden away in the dark so we can't see it? Is that what you are saying?

Mr. GUERTIN. Settlement is a legal settlement, sir. So——

Mr. BENTZ. Legal and confidential. Thus, the taxpayer never knows how much being spent.

Under this bill, which is objected to vociferously by Defenders of Wildlife, for good reason, I guess, on their part, they don't want people to know how much taxpayer money is going into their efforts. You don't have to agree, I am just saying that.

Mr. GUERTIN. I would just say, sir, if we do enter settlements, most of them are actually deadline settlements. And if I might have 1 second, sir, I would turn to Chairman Westerman.

And, sir, your point about that definition of science, we would like to take another look at that language. It was a little tricky to read, and just take another look at your point about what is precluded and not precluded. And while you were talking I was going through my notes, but just if we could take another look at that and come back to the Committee, sir.

Mr. BENTZ. Thank you. And with that, I want to thank the witnesses for their valuable testimony and the Members for their questions.

The members of the Committee may have some additional questions for the 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 Time on Friday, July 12. The hearing record will be held open for 10 business days for these responses.

Without objection, the Subcommittee stands adjourned.

[Whereupon, at 4:07 p.m., the Subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

Statement for the Record

U.S. Department of the Interior

H.R. 7544, the Water Rights Protection Act

Thank you for the opportunity to provide the views of the Department of the Interior (Department) on H.R. 7544, the Water Rights Protection Act. H.R. 7544 threatens the federal government's longstanding authority to manage federal lands and associated water resources, uphold our trust responsibility to Tribes, and ensure the proper management of public lands and resources. The legislation is overly broad, drafted in ambiguous terms, and likely to have numerous unintended consequences that would have adverse effects on existing law, Tribal water rights, and voluntary agreements. The Department strongly opposes H.R. 7544. The Department recognizes that H.R. 7544 may also impact the Department of Agriculture, though our comments are limited to Department concerns.

Background

The federal government has long complied with state law in acquiring water rights to support federal programs and land management activities. The United States also holds water rights under federal law in accordance with its right to regulate federal property, including lands and water, under Article IV, Section 3 of the Constitution, which grants the United States the authority to reserve water rights for its reservations and its property. Similarly, Article I, Section 8 of the Constitution granted the United States the power to regulate commerce with Tribes, which courts have cited, along with the treaty power found in Article II, Section 2, as authority to reserve Tribal water rights.

H.R. 7544

H.R. 7544 prohibits federal land management agencies from conditioning the approval of any permit, lease, or other use agreement on: 1) the transfer of water rights directly to the United States; 2) the application for or acquisition of water rights in the name of the United States; 3) limiting the date, time, quantity, location of diversion or pumping, or place of use of water rights beyond any applicable limitations under state water law; or 4) the modification of the terms and conditions of groundwater withdrawal, guidance and reporting procedures, or conservation and source protection measures established by a state. The bill also includes several provisions regarding policy development and planning that pertain to water rights.

Analysis

As an initial matter, H.R. 7544 would jeopardize the Department's ability to protect the lands and resources it is entrusted to manage on behalf of the American people and the Tribes to whom we owe a trust responsibility. For example, the Department is concerned that the bill could lead to conflict between federal permittees and other users of Department-managed lands where agreements between federal land managers and their permittees are conditioned on assurances that water will continue to be available for other users on-site, as well as for the purposes of federal reservations. These conflicts could hinder ongoing water use in a time when many communities are experiencing significant drought-related hardship, potentially tying up established practices in extensive and wasteful litigation.

In addition, the bill would create uncertainty for many existing voluntary arrangements that are designed to produce a more efficient operation of U.S. facilities in the wake of ongoing drought, climate change, and reduction of water supplies. We are concerned these provisions may prohibit or create uncertainty for parties voluntarily entering into agreements with the Department or its bureaus with respect to water rights in order to protect state, federal, Tribal, or third-party interests. For example, H.R. 7544 could create ambiguity for the Bureau of Reclamation (BOR) as we work with parties who acquire a state-based water right to support land, wildlife, and recreational activities on BOR-managed lands. The legislation, as currently written, could limit the BOR's ability to appropriately manage and include necessary controls for such partnerships and protect the interest of the United States and those of the public land.

Moreover, H.R. 7544 would preclude Departmental bureaus from protecting property interests or resource values as mandated by Congress. For example, the legislation would prohibit the National Park Service (NPS) from exercising its authority to perfect water rights in the name of the United States for waters diverted from or used on lands managed by the NPS, including operations associated with NPS concessioners, lessors, or permittees. The requirement that all water rights on NPS-managed lands be held in the name of the United States, which is grounded, in part, on the potential damage and disruption that privately held water rights could cause to park resources and operations, particularly if the private right holder sought to change key provisions of a water right such as the point of diversion, place of use, or the beneficial use to which the water is put. Furthermore, this requirement safeguards the inchoate federal reserved water rights associated with all water resources on NPS lands, which constitute federal property, from being impermissibly disposed of without express Congressional authorization.

The bill would also hinder the U.S. Fish and Wildlife Service's (FWS) implementation of the National Wildlife Refuge Administration Act to protect water rights acquired for national wildlife refuges, waterfowl production areas, and national fish hatcheries. The FWS works closely with its partners in state governments to balance the needs of states to maximize beneficial water utilization with federal mandates to consider impacts on wildlife and habitat. H.R. 7544 could hinder the FWS' ability to accept title to water rights in the name of the United States as mitigation to offset new depletions. Without these tools and partnerships in place, the critical balance of water availability for many native fish populations that federal, state, and Tribal agencies work to conserve and recover could be negatively impacted. More broadly, this could impact the ability of the FWS to meet its mission to manage public lands and conserve wildlife and habitat.

H.R. 7544 would also impose unnecessary restrictions on the Bureau of Land Management's (BLM) ability to manage water-related resources vital to many multiple uses on public lands and cooperatively mitigate impacts to sensitive water resources. The BLM holds water rights acquired under both state and federal law to ensure that water is available for the public, BLM permittees, wildlife habitat, and other public land resources. Under the Federal Land Policy and Management Act, the BLM has the authority to require terms and conditions on public land use authorizations to minimize damage to natural, scenic, and cultural resources, including fish and wildlife habitat and other water-related resources. H.R. 7544 could undermine cooperative arrangements with ranchers and local communities where the BLM frequently partners with public land users through collaborative agreements to plan, finance, and develop water resources. The BLM also commonly applies for new livestock water rights to the extent allowed by the laws of the state in which the land is located, including dual use water rights to support both stockwatering by BLM permittees and water use by wildlife, including big game species. The legislation would jeopardize the BLM's ability to manage water resources on public lands collaboratively with its permittees.

In terms of groundwater, the bill could prevent the Department from protecting groundwater-dependent surface resources, such as hot springs, caves, seeps, pools, springs, and hanging gardens, from damage caused by groundwater depletion. For example, section 3(2)(A) of the bill precludes Departmental managers from "assert[ing] any connection between surface water and groundwater that is inconsistent with such a connection recognized by state water law." Initially, the intent of this provision, its potential scope, and the context in which it would apply is unclear. Further, the best available hydrological science clearly recognizes the connection between groundwater and surface water, regardless of whether state law has explicitly recognized this connection. This provision may prevent the Department from using the best available science, with potentially disastrous results for many sites on federal lands that are treasured by the public for their ecological, recreational, aesthetic, and scientific values, as well as for Tribal Nations that rely on these sites for their cultural, religious, and economic wellbeing. Additionally, although the United States generally defers to the state processes and adjudications when it comes to water issues, these sections may unduly burden the Department and threaten the protection of federal property.

The bill could also create significant problems in the context of federal reserved water rights, which arise and exist independently upon state law. Although the federal government generally defers to the states in the allocation and regulation of water rights, dating back to 1908 the Supreme Court has held that the establishment of federal reservations—whether by treaty, statute, executive order, or otherwise—impliedly reserved water necessary to fulfill the purposes of those reservations, in what is known as the doctrine of federal reserved water rights. Originally expressed as the power to reserve water associated with a Tribal

reservation, over time, the Supreme Court and other courts have revisited and built on the doctrine in holding that reserved rights applied to all federal lands and that the doctrine represents an exception to Congress' deference to state water law in other areas. In the West, these reservations come with priority dates that often serve as protection from injurious surface and groundwater diversions by parties with junior priority.

Whether to provide a homeland for Tribes; protect national parks, wilderness areas, wild and scenic rivers, or wildlife refuges, migratory birds, and other federal trust species; secure safe and reliable drinking water supplies; safeguard public resource values; or maintain access for recreational uses associated with federal lands, the doctrine of federal reserved water rights along with existing federal land management authorities are a critical component in allowing the Department to fulfill its mission to protect and manage the Nation's natural resources and cultural heritage and honor its trust responsibilities and special commitments to Tribal Nations.

The Department notes that some states allow for unregulated groundwater use and provide no protection for groundwater-dependent resources. However, numerous federal and state courts, including the United States Supreme Court, as well as federal legislation, have recognized that federal reserved water rights may also be satisfied from groundwater, and this bill could negatively affect not only currently recognized rights, but future efforts to confirm such rights through adjudication or settlement. Undermining the Department's ability to manage groundwater resources could lead to significant damages to the public lands and the values they serve.

Additionally, section 3(1)(B) of H.R. 7544 would require the Department to "coordinate with the [s]tates to ensure that *any* rule, policy, directive, management plan, or similar federal action is consistent with, and imposes no greater restriction or regulatory requirement, than applicable [s]tate water law" (emphasis added). This clause has the potential to impose onerous new obligations on the Department's bureaus, as most of the specified actions already involve procedures for robust public and governmental participation and input. Moreover, this provision could ultimately prevent bureaus from implementing beneficial uses of water that are not recognized under state water law, even when those uses are squarely within the Department's mandate under federal law. For example, some states do not have statutes that recognize instream flow or water level protection as a beneficial use of water, and requiring federal agencies to coordinate their management plans with these state policies could prevent the NPS, FWS, and BLM and other bureaus from taking land management actions to protect habitat for special status species. In addition, section 3(2)(B) includes a sweeping prohibition on taking "any action that adversely affects" water rights granted by a state, a state's authority over water rights, or specified state definitions related to water rights. This provision would likely increase conflict between the Department and other adjacent water users and interfere with legitimate federal water management activities, including conflicts with federal reserved water.

The Department also notes that under section 13(c) of the Wild and Scenic Rivers Act, a federal reserved water right is created for each river segment included as part of the National Wild and Scenic Rivers System at the time of designation. This reservation is for the amount of water necessary to protect and enhance river values, including free-flow, water quality, and outstandingly remarkable values. As currently drafted, H.R. 7544 could undermine the Department's ability to manage wild, scenic, and recreational river designations for the benefit and enjoyment of present and future generations.

Finally, while the Department appreciates the Sponsor's inclusion of a variety of savings clauses that aim to limit the bill's effects—and its potentially significant unintended consequences—we are concerned that the language of some of these provisions directly contradicts other parts of the bill. This ambiguity could lead to future litigation and uncertainty.

Conclusion

We appreciate the opportunity to present the Department's views on H.R. 7544. As detailed above, the bill would negatively impact the Department's ability to manage water resources to protect ongoing public lands uses and the environment, allow for maximum beneficial use of federal water facilities, and ensure adequate water is available for fisheries and federal trust species. For these reasons, the Department strongly opposes this bill.

Statement for the Record

National Marine Fisheries Service
National Oceanic and Atmospheric Administration
U.S. Department of Commerce

H.R. 8811 and H.R. ____, ESA Amendments Act of 2024

Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee, thank you for the opportunity to provide comments regarding H.R. 8811, "America's Conservation Enhancement Reauthorization Act of 2024" and H.R. ____, the "ESA Amendments Act of 2024".

The National Oceanic and Atmospheric Administration (NOAA) is responsible for the stewardship of the nation's living marine resources and their habitat. Backed by sound science and an ecosystem-based approach to management, NOAA Fisheries provides vital services for the nation, including sustainable management of our fisheries, ensuring safe sources of seafood, and the recovery and conservation of protected species and healthy ecosystems. 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.

The Endangered Species Act

Under the Endangered Species Act (ESA), NOAA Fisheries works to recover marine and anadromous species while preserving robust economic and recreational opportunities. There are more than 160 endangered and threatened marine and anadromous species under NOAA's jurisdiction. Our work includes listing species under the ESA, monitoring species status, designating critical habitat, implementing actions to recover endangered and threatened species, consulting with other federal agencies to insure their activities are not likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat, developing ESA policies, guidance, and regulations, and working with partners to conserve and recover listed species. NOAA Fisheries shares the responsibility of implementing the ESA with the U.S. Fish and Wildlife Service (hereafter referred to as the Services).

Recognizing that the value of our natural heritage is incalculable, Congress enacted the ESA nearly unanimously in 1973, in acknowledgement of the broad public support for the prevention of species extinction and the conservation of ecosystems and biodiversity. The ESA is the nation's foremost conservation law for protecting wildlife and plants in danger of extinction. It plays a critical, science-based role in preventing the extinction of imperiled species, promoting their recovery, and conserving their habitats. It has been extraordinarily effective at preventing species from going extinct and has inspired voluntary action to conserve at-risk species and their habitat before they reach the point where they would qualify to be listed as threatened or endangered. Since it was signed into law, more than 99 percent of the species listed have been saved from extinction.

We offer the following comments on H.R. 8811, "America's Conservation Enhancement Reauthorization Act of 2024" and H.R. ____, the "ESA Amendments Act of 2024".

H.R. 8811—America's Conservation Enhancement Reauthorization Act of 2024

As a founding member of the National Fish Habitat Partnership (NFHP), NOAA provides national and regional leadership, funding, and technical expertise for coastal and marine activities that support its mission. NOAA is a committed partner in implementing the National Fish Habitat Action Plan to achieve healthy ecosystems, sustainable marine life, and resilient coastal communities through innovative solutions, flexible management, adaptability, and scientific research.

NOAA is supportive of the changes in Title II of H.R. 8811 related to the National Fish Habitat Partnership. Among those changes we support are the expansion of the National Fish Habitat Board to add a member from Regional Fishery Management Councils or Interstate Marine Fisheries Commissions as habitat conservation is essential to maintaining the sustainability of coastal and marine fisheries. We also support the change in section 203 to ease time constraints of fish habitat conservation projects recommended for funding by the Board to improve efficiency in the process.

H.R. ____—ESA Amendments Act of 2024

The purposes of the Endangered Species Act of 1973, as amended, are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions.

The ESA Amendments Act of 2024 would amend several provisions of the ESA including provisions pertaining to listing species, designating critical habitat, interagency cooperation, and promulgating protective regulations under section 4(d) for threatened species. NOAA Fisheries has concerns with many of these provisions because they would do little to improve conservation outcomes, would increase the cost and complexity of administering the ESA, and would reduce opportunities for public engagement. NOAA Fisheries supports the goal of optimizing species conservation and recovering listed species and is available to provide specific feedback, but strongly opposes this bill as currently drafted.

Definitions [Section 2]

Section 2 of the ESA Amendments Act of 2024 would codify the Services' 2019 regulation with respect to the interpretation of the "foreseeable future" in listing determinations. The ESA defines a threatened species as a species in danger of extinction throughout all or a significant portion of its range. NOAA Fisheries opposes this provision of the bill.

In 2024, the Services revised 50 CFR § 424.11(d), first promulgated in 2019, which describes the Services' framework for interpreting and implementing the term "foreseeable future." Our intent was to promulgate a regulation that was consistent with the Services' long standing practice based on a 2009 opinion from the Department of the Interior, Office of the Solicitor (M-37021, January 16, 2009; "M-Opinion"), that provides guidance on addressing the concept of the foreseeable future within the context of determining the status of species. However, following promulgation of the 2019 regulations, the language in the final rule created confusion regarding the way in which the Services interpret and implement this term. The 2019 regulation created confusion because it seemed to suggest the Services were adopting a novel requirement to conduct an independent analysis of the status of the species, rather than simply articulating how we determine the appropriate timeframe over which to conduct that analysis. The Services found it necessary and appropriate to revise this regulatory provision to explain more clearly the concept of the foreseeable future as it is used in the Act's definition of a "threatened species" and to align the regulatory language more closely to that of the M-Opinion. The revised description of the "foreseeable future" in the 2024 regulations is a more appropriate and clearer interpretation of these statutory terms.

Section 2 would also amend the ESA to codify the 2020 definition of "habitat" that the Services rescinded in 2022. NOAA Fisheries opposes this provision of the bill.

In 2020, the Services promulgated a regulatory definition of habitat for the purposes of designating critical habitat that defined habitat as "the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species." Following promulgation of this regulatory definition, the Services reconsidered the habitat definition rule and concluded that codifying a single definition in regulation could impede the Services' ability to fulfill their obligations to designate critical habitat based on the best scientific data available. The Services found that it is instead more appropriate, more consistent with the purposes of the Act, and more transparent to the public to determine what areas qualify as habitat for a given species on a case-by-case basis using the best scientific data available for the particular species. As a result, the Services rescinded the definition in 2022.

Listing Determinations [Sections 101, 201, and 405]

Section 101 of The ESA Amendments Act of 2024 would amend the ESA to require the Services to develop a National Listing Work Plan. While this has been an important tool for the U.S. Fish and Wildlife Service, the development of a National Listing Work Plan is unnecessary for NOAA Fisheries because NOAA Fisheries does not have the same workload versus capacity constraints as the Service and therefore is generally able to manage its ESA petition workload. Developing and maintaining this work plan could divert resources away from assessing petitions and conducting status reviews.

The ESA Amendments Act of 2024 would also amend the ESA to remove candidate species from the list of eligible species to receive funding under Section 6 agreements with States. NOAA Fisheries believes it is important to continue to

explicitly include candidate species in the statute as eligible species for funding under Section 6 cooperative agreements with States.

Section 201 of the ESA Amendments Act of 2024 would amend the ESA to require the Services, when determining whether to list a species, to take into account the net conservation benefit of any "Candidate Conservation Agreement with Assurances" or "Programmatic Candidate Conservation Agreement with Assurances" for that species. Candidate Conservation Agreements with Assurances are voluntary agreements that are used to provide incentives for non-Federal landowners to conserve candidate and other unlisted species. The Services currently enter into these agreements when we determine that the conservation measures that will be implemented address key current and anticipated future threats that are under the property owner's control and will result in a net conservation benefit to, and improve the status of, the covered species.

This bill's definition of "net conservation benefit" differs from that in the 2016 joint NOAA Fisheries and U.S. Fish and Wildlife Service candidate conservation agreement with assurances policy (81 FR 95164). The policy provides a clear definition of the term "net conservation benefit" that specifically refers to cumulative benefits of the conservation measures and describes how the benefits are measured. Consistent with the policy's definition, the conservation measures and property-management activities covered by the agreement must be designed to reduce or eliminate those key threats on the property that are under the property owner's control in order to increase the species' populations or improve its habitat. The ESA Amendments Act of 2024 defines "net conservation benefit" as the net effect of the agreement by comparing the situation of the candidate species with and without an agreement, rather than the cumulative benefits to the species referenced in the policy. As such, the bill would allow for exemption from future listing based on a lower standard than currently applicable, undermining the ability of the ESA to prevent extinction.

Section 405 of the ESA Amendments Act of 2024 would amend the ESA to require the Services to prepare an analysis of the economic effect, the effect on national security and any other relevant effect of listing a species under the ESA at the time the Services list a species as threatened or endangered. NOAA Fisheries opposes this provision of the bill.

This provision would undermine the requirement to base decisions to list species on the best available scientific and commercial data, would negatively affect our ability to make listing determinations within the statutory deadlines, and could introduce political considerations into listing decisions, resulting in delays in providing threatened and endangered species needed protections of the Act.

Critical Habitat [Section 202]

Section 202 of the ESA Amendments Act of 2024 would prohibit the Services from designating as critical habitat lands that are privately owned or controlled, and that are subject to a land management plan that the Secretary determines is similar to an integrated natural resource management plan under Section 101 of the Sikes Act. Privately controlled land is not defined. Existing section 4(a)(3)(B)(i) of the ESA precludes the Secretary from designating as critical habitat lands or geographical areas owned or controlled by the Department of Defense that are subject to an integrated natural resources management plan prepared under the Sikes Act, if the Secretary determines that the plan provides a benefit to the species.

When the Services designate critical habitat, we follow a science-based process to identify those specific areas that are essential for species conservation. Critical habitat designations are an important tool to educate the public and other federal agencies regarding areas essential for recovery of listed species.

While some of this provision in the ESA Amendments Act of 2024 is similar to Section 4(a)(3)(B)(i) of the ESA, it includes additional requirements and findings that would be very difficult to produce within the timeframes the ESA requires for critical habitat to be designated. For example, it provides that one way for a land management plan to be prepared is in cooperation with the Services and each applicable State fish and wildlife agency. The resource-intensive task of preparing and assessing potentially multiple plans in multiple states for wide-ranging species would strain the Services' limited resources, and cause delay. Even if land management plans are prepared independently of a multi-agency cooperative process, assessing plans that are otherwise developed and submitted to the Services would also be time-consuming and resource-intensive. In assessing those plans, the Services would be required by this bill to determine, among other things, whether the plan would result in an increase in the population of the species or would maintain the same population as the population that would likely occur if such land or

other geographical area were designated as critical habitat. Such an analysis would be difficult to conduct.

Section 202 would also amend section 4(b)(2) to require the Services to take into consideration the impact on efforts of private landowners to conserve the species when specifying a particular area as critical habitat. When designating critical habitat, NOAA Fisheries considers all relevant impacts of specifying any particular area as critical habitat. The Services 2016 Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act lays out, in detail, our approach to how we consider partnerships and conservation plans in the exclusion process. The 2016 Policy continues to provide useful guidance for evaluating private conservation efforts when designating critical habitat. As such, NOAA Fisheries believes this additional consideration is unnecessary.

Protective Regulations for Threatened Species [Section 301]

Section 9 of the ESA lists seven specific prohibited actions with respect to endangered species, which include prohibitions on import, export, interstate and foreign commerce, and take of endangered species of fish and wildlife. The Section 9 prohibitions for endangered species do not automatically apply to threatened species.

The ESA recognizes the different status of threatened and endangered species and provides greater flexibility in the conservation and management of threatened species under Section 4(d). NOAA Fisheries has utilized section 4(d) to provide a flexible, targeted approach to the management and conservation of threatened species.

Section 301 would amend Section 4(d) of the ESA to require that, when a 4(d) rule for a threatened species prohibits an act in Section 9(a) of the ESA, the Services develop incremental recovery goals for that species and provide for the stringency of the regulation to decrease as those recovery goals are met. In addition, under this bill, States could develop a recovery strategy for threatened or candidate species that the Service would adopt as the 4(d) rule within that State if certain criteria are met. These provisions may be difficult to implement because the recovery goals for a threatened species may not be known or may have not been identified at the time of listing the species, and undertaking the activities required by the bill could result in delays in putting protective regulations in place for threatened species. The development of recovery goals and strategies is best done through the development of a recovery plan under Section 4(f) of the ESA. Recovery plans include comprehensive recovery criteria, goals and strategies developed through a collaborative, inclusive process. The additional requirements and the process of reviewing and approving State recovery strategies required by the bill would be a resource-intensive effort that could divert NOAA Fisheries' resources from implementing conservation actions for the species and delay activities that could prevent a species from declining to the point where the statute requires listing it as endangered. Moreover, the petition process also appears to limit the public's ability to provide substantive input in the informal rulemaking process to adopt a 4(d) rule if a state's petition is approved.

5-year Reviews [Section 302]

Section 302 of this bill would revise the requirements in Section 4(c) of the ESA relating to the conduct of 5-year reviews of the status of listed species to determine whether any species should be removed from the list, changed in status from endangered to threatened or from threatened to endangered. Section 302 would require the Services to initiate rulemaking within 30 days of completing a 5-year review of the status of a species to remove or change the status of the species if the 5-year review determined a change in status is warranted. While NOAA Fisheries' goal is to ensure species maintain the proper classification under the ESA, the 30-day timeline to initiate rulemaking will be difficult to meet and could affect NOAA Fisheries' ability to prioritize its most important species conservation work.

Interagency Cooperation

The changes to section 7 of the ESA proposed in the ESA Amendments Act of 2024 were both addressed and discussed in detail in rulemaking, most recently the amendments to 50 CFR 402 effective May 6, 2024. Defining 'Environmental baseline' alone, without the other components of a biological opinion, would result in a definition of a term that is otherwise not mentioned in the Act itself. Additionally, the proposed language modifying incidental take statements, specifically reasonable and prudent measures in 7(b)(4)(ii), is inconsistent with the stated purposes of the Act. As discussed in our recent rule making, we feel relying on the regulatory restrictions of the minor change rule (50 CFR 402.14(i)(2)) provide more concrete

limitations on the extent of reasonable and prudent measures than the language proposed.

For these reasons, we believe the suggested changes to section 7 are more appropriate in regulation rather than as amendments to the Act.

Other Provisions of the ESA Amendments Act of 2024

Section 303 would exempt from judicial review a decision to delist a species during the 5-year monitoring period for delisted species. NOAA Fisheries has concerns about this provision. The 5-year monitoring time period represents a significant period of time in which the status of the species could be greatly impacted if a premature or incorrect decision was made to delist the species.

Section 401 would require the Services to make publicly available on the internet the best scientific and commercial data available that are used as the basis for each regulation to list species under the ESA. The Services listing decisions are based on the best available scientific and commercial data. The literature, studies, and other relevant data used in status reviews and listing determinations are discussed and referenced in NOAA Fisheries listing determination and status review documents. However, there may be limitations to the posting on the internet of certain data if the information falls within one of the exceptions to disclosure under the Freedom of Information Act. In these cases, NOAA Fisheries would refer the requester to the party from which the data originated. In addition, in its status reviews and listing determinations, NOAA Fisheries often relies on peer-reviewed published literature that may be a synthesis or analysis of data that are summarized by the prevailing scientific expert or author of the paper. In these circumstances, NOAA Fisheries relies on the expert evaluation and analysis of the data and may not have in its possession or be able to obtain the underlying data.

Section 402 would require the Services to provide all the data upon which a listing decision is based to the States before a listing decision is made. This would be a complicated and burdensome requirement for NOAA Fisheries that would hinder our ability to meet statutory deadlines for listing decisions because many of the ESA listed species under NOAA Fisheries' jurisdiction are highly migratory with a range across a multitude of states.

This section would also define the best scientific and commercial data available to include all data submitted to the Secretary by a State, Tribal, or county government. This provision is problematic. While NOAA Fisheries relies on the best available scientific and commercial data that often includes data submitted by states, Tribes or county governments, those data do not inherently constitute the best available scientific and commercial data. NOAA Fisheries evaluates those data, along with all other data, to identify the best available data. Mandating the Services to automatically rely on these data in making its listing decisions, could lead to species listing decisions that are not actually based on the best available scientific and commercial data as the statute requires. In addition, defining all data submitted by states or counties as the "best available," would create a quandary if there were conflicting data from such sources.

Section 403 would require the Secretaries of the Interior and Commerce to provide an annual report to Congress detailing litigation expenditures from agencies within their respective Departments within 90 days of fiscal year end. Agencies would need to provide the Secretary with detailed information, including a description of the claims; the amounts of resources expended responding to notices of intent to sue letters and all other actions in preparation of or related to litigation, as well as attorney's fees awarded and the basis for such awards. NOAA Fisheries does not track its resources in this manner. This provision would require NOAA Fisheries to revise its accounting systems to track and report on this information, diverting resources from NOAA Fisheries' conservation priorities.

Conclusion

NOAA is proud to continue to be a leader in conducting ocean science, serving the nation's coastal communities and industries, and ensuring responsible stewardship of our ocean and coastal resources. We value the opportunity to continue working with this Subcommittee on these important issues. NOAA supports optimizing species conservation and recovering listed species. NOAA strongly opposes the ESA Amendments Act of 2024 because of our concerns with the provisions that would diminish our ability to work effectively and efficiently to conserve and recover threatened and endangered species.

Submissions for the Record by Rep. Huffman

SOUTHERN ENVIRONMENTAL LAW CENTER
Washington, DC

July 9, 2024

Hon. Bruce Westerman, Chairman
Hon. Raul Grijalva, Ranking Member
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, DC 20515

Re: Letter for the Record: Legislative Hearing on the ESA Amendments Act of 2024

Dear Representatives Westerman and Grijalva:

The Southern Environmental Law Center writes in opposition to the ESA Amendments Act of 2024, which, in codifying several Trump Administration frameworks and definitions, would have the practical effect of replacing science-based review and public input with political decision-making. By shifting the burden of the management of listed species from federal agencies to states, the bill also risks deferring vital species and habitat management to programs with varying and uncoordinated missions.

In addition, the bill dramatically extends the timeline for listing decisions while fast-tracking delistings, blocks automatic take protection for species, increases allowable taking of threatened species, and narrows the scope of critical habitat designations in multiple harmful ways.

More than 250 species across the Southeast are protected by the Endangered Species Act, and these and many more are threatened by a mass extinction crisis, fueled by climate change and dramatic habitat loss. This bill would significantly impact agencies' ability to respond to that crisis, and for that reason we must strongly oppose it.

Sincerely,

ANDERS REYNOLDS,
Federal Legislative Director

July 9, 2024

Hon. Cliff Bentz, Chairman
Hon. Jared Huffman, Ranking Member
Committee on Natural Resources
Subcommittee on Water, Wildlife and Fisheries
1324 Longworth House Office Building
Washington, DC 20515

Dear Chairman Bentz and Ranking Member Huffman:

On behalf of our organizations and our millions of members and supporters we are writing to express our strong opposition to the "Endangered Species Act Amendments of 2024" Discussion Draft, one of the bills being heard today by the Subcommittee.

The planet is facing an alarming and catastrophic worldwide biodiversity crisis, largely driven by humankind. Development, habitat loss, exploitation, pollution and invasive species now threaten as many as one million species with extinction. These threats are exacerbated by climate change, which is increasingly impacting our planet.

The Endangered Species Act (ESA) is our most effective tool to prevent extinction. Nearly all species listed under the ESA have been saved from disappearing forever and hundreds are on the path to recovery. The bill before the Subcommittee today does not strengthen the ability of the ESA to conserve imperiled species. At a time when we should be redoubling our commitment to protect biodiversity and stop extinction, this bill would undermine key provisions of the ESA and result in significant harm to at-risk species and their habitats, further exacerbating the environmental challenges we are facing today.

There are numerous provisions in the bill that would dramatically weaken the ESA and lead to decreased protections for threatened and endangered species, ultimately condemning them to continued slow declines and challenges. It would significantly rewrite key portions of the ESA to prioritize politics over science and inappropriately shift responsibility for key implementation decisions from the federal government to the states, many of which do not have sufficient resources or legal mechanisms in place to take the lead in conserving listed species. It would place significant new administrative burdens on already over-burdened agencies. It would turn the current process for listing and recovering threatened and endangered species into a far lengthier process that precludes judicial review of key decisions.

More specifically, among other things, the bill would:

- dramatically extend the timeline for listing decisions while imperiled species continue to slide, meanwhile fast-tracking delistings;
- block automatic take protection for threatened terrestrial and freshwater species;
- significantly increase allowable taking of threatened species, which then may decline toward endangered status;
- diminish federal agencies' traditional role in listed species management;
- narrow the scope of critical habitat designations in multiple harmful ways;
- increase the role of the ESA's ineffective "Candidate Conservation Agreements with Assurances" program and decrease its available protections;
- obliterate science-based decision making by converting all state-submitted data into "best available science," regardless of its quality;
- erode public accountability in wildlife management; and
- preclude full mitigation for certain agency actions that harm species.

Once again, we oppose this damaging bill which would dramatically weaken the ESA and make it harder, if not impossible, to achieve the progress we must make to address the alarming rate of extinction our planet now faces. Thank you for your attention.

Sincerely,

American Bird Conservancy
Animal Legal Defense Fund
Animal Welfare Institute
Center for Biological Diversity
Defenders of Wildlife
Earthjustice
Endangered Species Coalition
Friends of the Earth
Humane Society of the United States
Humane Society Legislative Fund
League of Conservation Voters
Natural Resources Defense Council
Oceana
Sierra Club
Western Watersheds Project
WildEarth Guardians