EVALUATING THE IMPLEMENTATION OF THE MARINE MAMMAL PROTECTION ACT AND THE ENDANGERED SPECIES ACT

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON WATER, WILDLIFE AND FISHERIES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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NATURAL RESOURCES

CHAIRMAN BRUCE WESTERMAN

To: Committee on Natural Resources Republican Members

From: Water, Wildlife and Fisheries Subcommittee staff: Annick Miller, (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) x58331

Date: February 24, 2025

Subject: Oversight Hearing titled "Evaluating the Implementation of the Marine Mammal Protection Act and the Endangered Species Act"

The Subcommittee on Water, Wildlife and Fisheries will hold an Oversight hearing on "*Evaluating the Implementation of the Marine Mammal Protection Act and the Endangered Species Act*" **Wednesday, February 26, 2025, at 10 a.m. (EST) 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 Tuesday, February 25, 2025, if their Member intends to participate in the hearing.

I. KEY MESSAGES

- The recent *Loper Bright Enterprises v. Raimondo* decision reiterates that Congress has the responsibility to reign in the overreach of executive branch agencies in implementing laws.
- The Endangered Species Act and Marine Mammal Protection Act are well-intentioned laws that have been exploited by the federal government and radical environmental organizations to stifle development and hinder species recovery.
- House Republicans will ensure that federal agencies are held accountable for their regulatory overreach and will work to reform these statutes so they are implemented as Congress intended.
- Empowering states, tribes, local governments, and private landowners in the regulatory decision-making process is the best path forward for both the health of species and the sustainability of local communities that coexist with species.

II. WITNESSES

- **Mr. Parker Moore**, Principal, Beveridge & Diamond PC, Washington, DC
- **Mr. Paul Weiland**, Partner, Nossaman LLC, Irvine, California
- **Mr. John Vecchione**, Senior Litigation Counsel, New Civil Liberties Alliance, Arlington, Virginia
- **Mr. Daniel Rohlf**, Professor of Law, Lewis and Clark Law School, Portland, Oregon [Minority witness]

III. BACKGROUND

Overview of *Loper Bright Enterprises v. Raimondo*

On June 28, 2024, the Supreme Court (Court) overruled the so-called *Chevron* framework in a case known as *Loper Bright Enterprises v. Raimondo* (*Loper*) in a 6–2 decision.[1] *Chevron* was a judicial precedent that required courts to defer to agency interpretations of ambiguous laws. In its decision, the Court ruled that the *Chevron* framework violated Section 706 of the Administrative Procedure Act (APA), which charges the courts with interpreting all relevant questions of law.[2] Accordingly, in its decision, the Court directed federal courts to exercise independent judgment to determine how to interpret federal statutes.[3]

The *Loper* petition stemmed from a challenge to the National Marine Fisheries Service (NMFS) and New England Fishery Management Council's (NEFMC) decision to allow at-sea observers to monitor the Atlantic herring fishery. The Magnuson-Stevens Fishery Conservation and Management Act (MSA), the primary law governing federal fisheries, authorizes NMFS to require observers on fishing vessels to prevent overfishing and other harmful activities.[4] In 2013, the NEFMC began requiring fishing vessels to pay the costs of monitoring done by the observers to lower costs for federal agencies, despite MSA not explicitly giving the NEFMC this authority. This policy was codified by NMFS in a final rule on February 7, 2020.[5] Loper Bright Enterprises sued NMFS in the U.S. District Court of the District of Columbia, arguing that NMFS did not have the authority to mandate the industry fund monitoring of its own fleets.[6]

Figure 1 Atlantic herring vessel off the coast of Maine | Source: GBH

The *Chevron* framework was named after the landmark case, *Chevron U.S.A., Inc v. Natural Resources Defense Council, Inc*, which was decided by the Court in 1984.[7] The *Chevron* decision was built on several assumptions by federal courts. First, if Congress wrote a statute ambiguously, then they intended to delegate interpretation to federal agencies. Second, agencies have more expertise than courts in interpreting statutes they administer. Finally, agencies are accountable to the President and to Congress, so they have more claim to make policy than courts do.[8]

Accordingly, *Chevron* was most applicable when Congress gave a federal agency the general authority to make rules with the force of law. In cases where *Chevron* applied, a federal court would first determine whether Congress directly addressed the exact issue being considered by the court. If it was clear that Congress had addressed the issue, then the court would implement congressional intent. However, if Congress did not specifically address the issue in statute, the court would defer to the agency's interpretation of the relevant statute.[9]

Overview of the Endangered Species Act

The Endangered Species Act (P.L. 93–205) (ESA or Act) was enacted in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth" in the Act.[10]

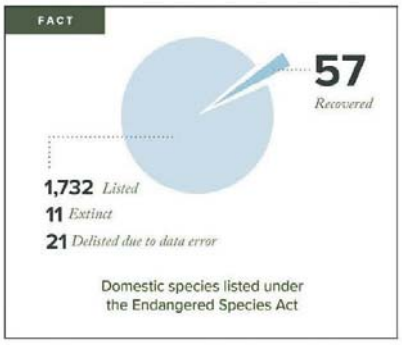

Figure 2 Graph on the number of listed species that have been recovered | Source: PERC

This mandate impacts federal agencies, state and local entities, private organizations, and individuals by covering federal "actions" such as funding, permitting, licensing, and the granting of easements and rights-of-ways. The ESA also prohibits the taking of listed species, which applies directly to private individuals without requiring a federal nexus.[11]

The last time Congress significantly amended the ESA was in 1988.[12] Despite these revisions, the main provisions of the ESA remain intact and govern species conservation efforts today.

Under the current framework, Section 4 charges the U.S. Fish and Wildlife Service (FWS or Service) and NMFS with reviewing and acting on petitions to list species as threatened or endangered and designate their critical habitat.[13] 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."[14] 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."[15] 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.[16]

Figure 3 Picture of a lesser prairie chicken, the subject of H.J. Res 29. | Source: Santa Fe New Mexican

The consultation processes required by Section 7 and Section 10 have become a point of concern in recent years with the significant uptick in the need for new energy transmission projects and federal water projects. In addition, Section 6 requires the implementing federal agencies 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."[17]

Litigation and threats of litigation on both substantive and procedural grounds have significantly increased, upending the listing and delisting process under the

ESA.[18] Historically, Republicans have raised questions over the statute's ambiguity, the petition and listing process's unscientific timeframes, and the lack of data transparency supporting decisions.[19]

Actions taken by the Committee on Natural Resources

During the 118th Congress, the House Committee on Natural Resources (Committee) held two oversight hearings and three legislative hearings focused on the ESA, both on species-specific issues and reforming the Act as a whole. These hearings resulted in eight bills related to the ESA being favorably reported by the Committee, three of which passed the House of Representatives. Two of these bills, H.J. Res. 29 and H.J. Res. 49, also passed the Senate but were vetoed by President Biden.

H.R. 9533, the "ESA Amendments Act of 2024," which was reported favorably by the Committee in September 2024, would have reauthorized the Act with a series of reforms. The bill added definitions for the "environmental baseline," as it relates to ESA consultations on federal projects and the "foreseeable future" when determining if a species is threatened. Each provides regulatory certainty to the public by limiting agency discretion. The bill also codified into law a congressionally mandated ESA workplan structure to ease the burden on the federal government to meet arbitrary timelines that incentivize litigation by radical environmental organizations. The bill also contained provisions designed to refocus the Act to its original intent: to recover listed species. These provisions included:

- Creating a structure to delegate more management authority to states as a species improves
- Protecting private landowners from punitive critical habitat designations when those landowners are already voluntarily investing in species conservation, and
- Preventing judicial review during the five-year monitoring period post-delisting.

More information on H.R. 9533 bill can be seen HERE.

Recent Actions by the Trump Administration

Since taking office again in 2025, President Trump has signed a series of Executive Orders (E.O.), several of which contain provisions related to the ESA. In E.O. 14156, entitled "Declaring a National Energy Emergency," President Trump directs federal agencies to use emergency authorities to expedite permitting for energy projects to "facilitate the Nation's energy supply."[20] Federal agencies are required to report to the Secretary of the Interior, Secretary of Commerce, the Office of Management and Budget Director, the Director of the National Economic Council, and the Chairman of the Council on Environmental Quality every 30 days on the progress of permitting energy projects under the ESA during the national emergency.[21]

E.O. 14156 also highlights the ESA Committee, sometimes called the "God Squad." The ESA Committee is made up of at least seven members: the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration (NOAA), and at least one individual from each state affected by the proposed action.[22] Section 7(g) of the ESA allows federal agencies or project applicants to request an exemption from the ESA Committee during the Section 7 consultation process if a "jeopardy" biological opinion is levied against a proposed agency action.[23] E.O. 14156 requires the ESA Committee to meet quarterly to review any Section 7 exemption applications it has received.[24] If it has not received any applications, it "shall convene to identify obstacles to domestic energy infrastructure specifically deriving from implementation of the ESA or the Marine Mammal Protection Act."[25]

For an agency action to receive a "jeopardy" biological opinion, FWS or NMFS must determine the action would jeopardize the continued existence of the species or adversely modify designated critical habitat. An exemption from the ESA Committee would absolve the federal agency or project applicant from any proposed reasonable and prudent alternatives (RPAs). To grant this exemption, the ESA Committee must: determine if any RPAs exist for the action, if the benefits of the action outweigh the benefit of conserving the species, if the action is of regional or national significance, and if no "irreversible or irretrievable commitment of resources" has been made by the federal agency or project applicant.[26] If the ESA Committee determines that each of those factors have been met, they can then grant the exemption. However, if an exemption is granted by the ESA Committee,

it must then establish "reasonable mitigation and enhancement measures" to minimize the adverse effects of the action.

President Trump also highlights the ESA in his E.O. 14181 entitled, "Emergency Measures to Provide Water Resources in California and Improve Disaster Response in Certain Areas."[27] The E.O. also highlights the "God Squad" as a potential mechanism to expedite the operations of the Central Valley Project and the State Water Project, which deliver water through a series of tributaries and dams from Northern California to communities in Central and Southern California.[28]

Figure 4 Picture of Shasta Dam, a vital part of the Central Valley Project. | Source: National Park Service

ESA Policy Under the Biden Administration

In addition to President Trump's actions, Interior Secretary Doug Burgum issued Secretarial Order (S.O.) 3418, titled "Unleashing American Energy."[29] S.O. 3418 mandates Assistant Secretaries within the Department of the Interior to "suspend, revise, or rescind" certain actions by the Biden administration. Three rulemakings related to the implementation of the ESA that were finalized in 2024 are also included.[30]

The Committee has highlighted these ESA rules for their negative consequences for recovering listed species and their breach of Congressional intent. The first rule, "Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants," reinstated the so-called "blanket 4(d) rule" for threatened species.[31] This authority places the same ESA protections on threatened species as there are for endangered species unless otherwise specified in a species-specific rulemaking. This approach hinders species recovery by effectively removing positive incentives for affected parties that result in down listing a listed species and lowering regulatory burdens.

The second rule "Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat," lowers the bar for agencies to designate critical habitat in areas that not currently occupied by the species.[32]

The third rule "Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation," made changes to how FWS and NMFS implement Section 7 of the ESA. The rule made changes to the definition of "effects of the action" and "environmental baseline," and revises provisions related to reasonable and prudent measures when it relates to the incidental take of a listed species.[33] Of particular concern is the elimination of clarifying language that specified that an effects analysis is limited to aspects of the proposed action that are "reasonably certain to occur."[34] Giving the FWS and NMFS wide latitude to review aspects of project proposals would likely have no impact on the species in question, but would lead to additional costs and delays in the permitting process.

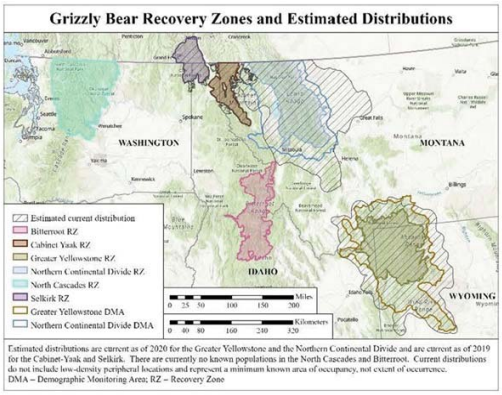

Figure 5 Map of grizzly bear recovery zones. | Source: USFWS

The Biden administration also made many consequential listing decisions during its four years in office. Of particular concern to many members of the Committee is the difficulty and, in some cases, the outright refusal to delist recovered species. For example, in the final days of the Biden administration, the FWS denied petitions from the states of Wyoming and Montana, which called for the establishment and delisting of grizzly bears in the Greater Yellowstone Ecosystem (GYE) and Northern Continental Divide Ecosystem (NCDE) in what are known as Distinct Population Segments (DPS).[35] Second, as a part of the proposed rule, the Service proposed creating one DPS, where grizzlies would keep their threatened status, encompassing all six current grizzly bear recovery zones and the areas around them.[36] The DPS would cover almost the entire land area of Idaho, Montana, Washington, and Wyoming, despite not having a single grizzly bear present in much of that area, setting back recovery for generations.[37] This is all despite Idaho, Montana, and Wyoming dedicating millions of dollars and successfully recovering grizzly bears to the point where populations in the GYE and NCDE are approximately double their recovery goals and meeting other federal recovery metrics.[38]

Overview of the Marine Mammal Protection Act

The Marine Mammal Protection Act of 1972 (P.L. 92–522) (MMPA) was enacted "to conserve marine mammal populations and protect them from extinction or depletion as a result of human activities."[39] The MMPA, primarily administered by the FWS and NMFS, seeks to conserve and protect marine mammal populations. It does so, in part, by finding that marine species "should not be permitted to diminish below their optimum sustainable population" (OSP).[40] OSP is defined as "the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element."[41]

In 2000, the MMPA was amended to create the John H. Prescott Marine Mammal Rescue Assistance Grant Program, which has provided more than $75 million in grants to 26 states, two territories, three tribes, and the District of Columbia from 2001 to 2023.[42] In 2018, Congress passed, and President Trump signed in to law, the Endangered Salmon Predation Prevention Act (P.L. 115–329), which gave the Secretary of Commerce the authority to authorize take of sea lions in the Columbia River.[43] Before that, the MMPA was last amended more than 30 years ago in 1994. Those amendments provided a statutory definition of "harassment" as well as criteria for the two levels of harassment, Level A and Level B.[44] Level A harassment is defined as "any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild,"[45] while Level B harassment is defined as "any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering."[46]

The 1994 amendments also included a requirement to develop stock assessments "for each marine mammal stock which occurs in waters under the jurisdiction of the United States;"[47] created a program to prevent incidental take of marine mammals for commercial fishing;[48] developed exceptions on the take moratorium for marine

mammals;[49] and directed the study of how specific mammals like sea lions and seals impact the nation's federal fisheries.[50]

The MMPA, as amended, contains five main titles. Title I focuses on the prohibition of take of marine mammals, the different mechanisms to obtain an authorization of take for different types to activities and develops the federal regulations governing the administration of the MMPA. Title II establishes the Marine Mammal Commission (MMC) which provides independent, science-based information addressing human impacts on marine mammals. Title III establishes the International Dolphin Conservation program to protect dolphins, whose provisions largely impact the commercial tuna industry.[51] Title IV, enacted in 1992, created the Marine Mammal Health and Stranding Response Program. This program helps coordinate emergency responses to sick, injured, distressed, or dead marine mammals. Finally, Title V includes provisions for the protection of polar bears and polar bear management, including the United States' participation in the Agreement on the Conservation of Polar Bears with Russia, Norway, Denmark, and Canada.

Title I prohibits the taking or importation of marine mammals or any products of marine mammals but includes authority for the Secretary of Commerce and NMFS to issue exemptions and permits for limited take included in the 1994 amendments. The MMPA defines a take as "to harass, hunt, capture or kill, or attempt to harass, hunt, capture, or kill any marine mammal."[52] It also focuses on maintaining sustainable populations of marine mammals by directing agencies to conduct stock assessments, developing recovery plans for depleted stocks, and providing for the administration of federal regulations related to the MMPA. Commercial fishing implications of the MMPA are also covered under Title I, with guidance for incidental takes and requirements for gear and practices focused on reducing incidental takes.

Figure 6, shown below, includes the different types of authorizations issued by federal agencies for incidental and directed takes of marine mammals.

Table 1. Authorizations and Permits for Incidental and Directed Takes of Marine Mammals

Type of Authorization	Authorized Activities	Federal Agency	Citations
Incidental Takes			
Marine Mammal Authorization	Incidental take of marine mammals during U.S. commercial fishing operations	NMFS	16 U.S.C. §§1371, 1387(c), 1416; 50 C.F.R. §§229.1-229.37
Incidental Take Authorization (ITA)	Incidental take of marine mammals during non-fishing activities, including those by the military, energy, scientific, and marine construction sectors	FWS or NMFS	16 U.S.C. §1371(a)(5)(A)-(D); 50 C.F.R. §§18.1-18.152; 50 C.F.R. §§216.1-219.40
Incidental Harassment Authorization	An ITA for small-scale non-fishing activities or those expected to result only in marine mammal harassment	FWS or NMFS	See citations for an ITA.
Letter of Authorization (LOA) or Incidental Take Regulation (ITR)	An ITA for larger-scale activities or those that may cause serious injury or mortality to marine mammals	NMFS or FWS each issue LOAs FWS issues ITRs MMC consults on specifically issued regulations for a given activity	16 U.S.C. §1373(a); see also citations for an ITA.
Directed Takes			
Permits	Specific permits may be issued for scientific, public display, enhancement, relocation, and/or photography purposes or for importing polar bear parts	NMFS, FWS, and in consultation with the MMC	16 U.S.C. §§1371, 1374; 50 C.F.R. §§18.1-18.34; 50 C.F.R. §§216.1-216.50

Figure 6 Authorizations and Permits for Incidental and Direct Takes of Marine Mammals | Source: Congressional Research Service

MMPA Policy Under the Biden Administration

The Biden administration took several actions using authorities under the MMPA and ESA that would have resulted in devastating consequences for coastal communities along the Atlantic coast and the Gulf of America. First was NOAA's proposed amendments to the North Atlantic right whale vessel strike reduction rule.[53] Since October 2008, NOAA has had a 10-knot speed restriction for vessels 65 feet and longer.[54] While this rule has made progress in preventing vessel strikes and protecting marine mammals,[55] NOAA has experienced challenges in ensuring compliance with it.[56] Later, in 2022, NOAA released a proposed rule that would have dramatically expanded this speed restriction to vessels as small as 35 feet.[57] In July 2024, a bipartisan coalition of more than 50 members of the House of Representa-

tives urged the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs (OIRA) to seek more input before finalizing the rule.[58] After a great deal of pressure, the Biden administration withdrew the rule in January 2025.[59]

This rule was developed with NOAA's authorities under the MMPA in ways that were met with a great deal of criticism. First, Section 404 of the MMPA gives the Secretary of Commerce, acting through NOAA's Office of Protected Resources, the ability to declare an unusual mortality event (UME),[60] which is defined as "a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response."[61] In 2017, NOAA declared a UME for the North Atlantic right whale.[62] The proposed rule states, in part, that whale collisions with vessels "are a leading cause of the species' decline and a primary factor in an ongoing Unusual Mortality Event."[63] However, stakeholders noted that the role of vessel strikes in whale deaths—particularly for small vessels—was not supported by the statistics to justify the expanded regulation.[64] Additionally, it is worth noting that in October 2024 it was reported that the North Atlantic right whale population increased nearly 4 percent from 2020 to 2023.[65]

MMPA also requires regulatory actions to establish a potential biological removal (PBR), which is defined as "the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population."[66] The rule also established a PBR of 0.7 whales for the East Coast.[67]

This rule met great opposition from numerous stakeholders operating along the Atlantic Coast and was the subject of Committee oversight.[68] Many experts viewed the regulatory approach taken in this instance as an example of NMFS taking an overly cautious approach to regulating an activity that was not backed up by the best science and data.

More recently, stakeholders in the Gulf of America have expressed concern about regulations developed under the MMPA and the ESA that could drastically harm the oil and gas sector. Whether it is ongoing concerns with the future of the Biological Opinion for offshore oil and gas or the Biden administration's proposed critical habitat designation for Rice's Whale, among others, examining ways that both the MMPA and ESA can work better will be a critical piece of the Committee's efforts to enact regulatory reforms that clarify congressional intent and make our environmental statutes more responsive to the needs of the 21st century.

Examining the challenges and impact on critical sectors of our economy like offshore energy production, fisheries management, and coastal research activities that the MMPA has presented is long overdue. Notably, several of these provisions have been the subject of controversy in recent years. For example, Title I allows the Secretary of Commerce to authorize the "taking by harassment of small numbers of marine mammals of a species or population stock"[69] provided that the Secretary finds that it "will have a negligible impact on such species or stock."[70] The authorization and reauthorization of take for some of these activities—whether it's research activities for fisheries management or offshore energy production in the Gulf of America—can often be a burdensome process to navigate and has been subject to litigation. Additionally, authorizations for both Level A and Level B harassment carry many different reporting requirements while the permitted activity is being conducted and after that activity is completed. Determining ways to make this process clearer is also an area worth exploring, particularly in a post-*Chevron* world.

Conclusion

The ESA and the MMPA are two examples of environmental statutes whose permitting processes have been weaponized against projects designed to manage our coasts and our fisheries and unleash American energy resources. In a post-*Chevron* world, the Committee on Natural Resources has an opportunity to examine how these statutes have worked and how they've served as a barrier or hindrance to economic activity. This hearing will be an essential component of congressional Republicans' examination of the Federal permitting process.

[1] Decision No. 22-451. U.S. Supreme Court. 22-451 Loper Bright Enterprises v. Raimondo (06/28/2024)
[2] 5 U.S.C. 706
[3] Decision No. 22-451. U.S. Supreme Court. 22-451 Loper Bright Enterprises v. Raimondo (06/28/2024)
[4] 16 U.S.C. 1881b
[5] 85 FR 7414
[6] Civ. Action No. 20-466, U.S. District Court for the District of Columbia. Loper Bright Enters. v. Raimondo, 544 F. Supp. 3d 82 | Casetext Search + Citator
[7] Decision Nos. 82-1005, 82-1247 and 82-1591. U.S. Supreme Court. CHEVRON, U.S.A., INC., Petitioner, v. NATURAL RESOURCES DEFENSE COUNCIL, INC., et al. AMERICAN IRON AND STEEL INSTITUTE, et al., Petitioners, v. NATURAL RESOURCES DEFENSE COUNCIL, INC., et al. William D. RUCKELSHAUS, Administrator, Environmental Protection Agency, Petitioner, v. NATURAL RESOURCES DEFENSE COUNCIL, INC., et al. | Supreme Court | US Law | LII / Legal Information Institute
[8] R48320
[9] R48320
[10] Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.
[11] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 10).
[12] Public Law 100-478, the Endangered Species Act Amendment of 1988. https://www.congress.gov/100/STATUTE-102/STATUTE-102-Pg2306.pdf
[13] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 10).
[14] 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.
[15] "ESA Basics: 50 Years of Conserving Endangered Species." U.S. Fish and Wildlife Service. 2/1/23. Endangered Species Act Basics (fws.gov)
[16] Wilsey1, CB, J Grand, J Wu, N Michel, J Grogan-Brown, B Trusty. 2019. North American Grasslands. National Audubon Society, New York, New York, USA. audubon_north_american_grasslands_birds_report-final.pdf (nas-national-prod.s3.amazonaws.com)
[17] Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.
[18] "Federal Court Strikes Down ESA Rule by Fiat." Kat Dwyer. 7/6/22. https://perc.org/2022/07/06/federal-court-strikes-down-esa-rules-by-fiat/
[19] Endangered Species Act Congressional Working Group. "Report, Findings, and Recommendations." https://www.endangeredspecieslawandpolicy.com/assets/htmldocuments/blog/4/2014/10/finalreportandrecommendations-113.pdf
[20] E.O. 14156
[21] *Id.*
[22] 16 U.S.C. 1536
[23] *Id.*
[24] E.O. 14156
[25] *Id.*
[26] 16 U.S.C. 1536
[27] E.O. 14181
[28] *Id.*
[29] S.O. 3418
[30] *Id.*
[31] 89 FR 23919
[32] 89 FR 24300
[33] 89 FR 24268
[34] *Id.*
[35] 90 FR 3763 and 90 FR 3783
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OVERSIGHT HEARING ON EVALUATING THE IMPLEMENTATION OF THE MARINE MAMMAL PROTECTION ACT AND THE ENDANGERED SPECIES ACT

Wednesday, February 26, 2025
U.S. House of Representatives
Subcommittee on Water, Wildlife and Fisheries
Committee on Natural Resources
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:16 a.m., in Room 1324, Longworth House Office Building, Hon. Harriet Hageman [Chair of the Subcommittee] presiding.

Present: Representatives Hageman, Wittman, Radewagen, LaMalfa, Boebert, Bentz, Walberg, Ezell, Maloy, McDowell, Crank, Westerman; Hoyle, Magaziner, Dingell, Stansbury, Golden, Min, Elfreth, Gray, Rivas, Soto, Brownley, and Huffman.

Also present: Representative Beyer.

Ms. HAGEMAN. The Subcommittee on Water, Wildlife and Fisheries will come to order.

I apologize for being a few minutes late. We have what are called Wyoming Wednesdays, where we try to meet with everyone in the State within 1 hour.

Good morning, 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 Chair 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.

We are here today to hold an oversight hearing entitled, "Evaluating the Implementation of the Marine Mammal Protection Act and the Endangered Species Act," and I now recognize myself for a 5-minute opening statement.

STATEMENT OF THE HON. HARRIET M. HAGEMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Ms. HAGEMAN. Article I of the U.S. Constitution grants Congress the exclusive power to legislate a fundamental safeguard to prevent the concentration of power in any one branch of government or unelected bureaucrats. The recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo* marks a critical turning point, reinforcing the principle that courts should not defer to Federal agencies when interpreting the law. This ruling is a vital step in restoring the constitutional balance of power, protecting the due

process rights of our citizens, and ensuring that unelected bureaucrats no longer have unchecked authority to shape and define statutory policy at the expense of the American people, and contrary to congressional intent.

This decision, however, also serves as a plea to Congress to write better laws. For far too long, this legislative body has taken the easy way out, writing vague and ambiguous laws riddled with undefined terms and broad authorities. We must do better.

Today, we are examining two far-reaching and consequential laws: the Endangered Species Act, or ESA; and the Marine Mammal Protection Act, or MMPA, both of which have been administratively defined and redefined so many times that their original authors would be hard pressed to recognize their original hcreations.

While my home State of Wyoming is not directly impacted by the MMPA, this law impacts industries that are important to all Americans, not just the coastal States. These include our fishing industry, ports, maritime transportation, and offshore energy development. When MMPA was first enacted in 1972, it was 20 pages long. The NOAA document created by the agency that sets forth criteria just for determining "negligible impact," which is an undefined term in MMPA, is equally as long. Although well intended at the time it was enacted, MMPA's ambiguous, outdated, and unclear language has proven unworkable.

And in Wyoming everyone is directly impacted by the ESA. Wyoming has 20 ESA-listed species. And while we all know about the grizzly bear, there are other listed species in Wyoming such as the Preble's meadow jumping mouse, whose listing has proven both scientifically and politically controversial. Strangely enough, the only way to determine if a mouse is a "Preble's meadow jumping mouse" is to kill it and measure its skull. ESA compliance thus requires killing of the very species that the Fish and Wildlife Service is trying to protect. That is how far off the rails the ESA has become.

For decades stakeholders in Wyoming and Colorado have advocated for the delisting of the Preble's meadow jumping mouse, arguing that it is not a valid sub-species, and this is not uncommon. An alarming number of species are listed under the ESA, but do not have what the public would describe as the best available science backing up those decisions.

Even species that weren't downlisting or delisting are often caught in a never-ending loop of bureaucracy and litigation. Species like the razorback sucker, a fish that the U.S. Fish and Wildlife Service proposed to downlist in 2021 yet they have never finalized that action, or the Greater Yellowstone Ecosystem grizzly bear, which has been listed as threatened since 1975. Its original recovery goal for Wyoming was set at 500 bears. Today, the population has more than doubled to 1,100 bears, far exceeding recovery benchmarks. In fact, the Greater Yellowstone Ecosystem grizzly population has exceeded recovery goals for over two decades, over two decades. And despite the success on their way out the door, the Biden administration further delayed delisting of this species.

There is no denying that after half a century both laws need improvement, and the Committee intends to do just that. Changes

to the statutes will significantly improve the regulatory process for both Federal regulators and the regulated community.

And with that I want to take the time to thank our witnesses for being here today, and I look forward to a robust conversation.

I now recognize the Ranking Member, Ms. Hoyle, for her opening statement.

STATEMENT OF THE HON. VAL T. HOYLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Ms. HOYLE. Thank you. Good morning, and thank you to all the witnesses for being here today.

The ESA is popular and effective at preventing extinction. For over 50 years, the Endangered Species Act has prevented the extinction of over 99 percent of the species listed. Over 84 percent of Americans support the law. It is the law of last resort. Species are listed as threatened or endangered once the best available science shows the species is at risk of extinction, or without intervention will be at risk of extinction.

There are claims that the Supreme Court's action overturning the *Chevron* deference gives new justification to roll back the ESA and Marine Mammal Protection Act, but that is not what the *Loper Bright* decision does. Loper recognizes the courts will have final say on the single best meaning of a statutory provision, which, honestly, should be left to scientists to establish which species should be listed or delisted on the Endangered Species Act.

The Endangered Species Act is already clear. Congress' stated purpose of the ESA is to stop extinction and recover species. Courts have repeatedly noted these goals. The ESA sets up a straightforward, science-based process for this: list, protect, recover, then delist.

Congress has consistently underfunded ESA programs at Federal agencies for years, contributing to the conflicts over listing, permitting, and consultation.

The recent Trump administration actions firing tens of thousands of Federal workers without any strategic analysis as to the effect on agencies to do consultation, approve permits, and recover species, is irresponsible, and is another example of undermining the ability of government to do the work, then blaming Federal agencies and those workers for not getting the job done. In fact, even Republicans have rightfully expressed concerns that permits won't be processed in a timely fashion because of what has just happened.

We are in a biodiversity crisis, and need these core conservation laws to work. Recovered species are good for everyone. And yes, we need to ensure that as endangered species recover and thrive, that they are delisted in a timely fashion. However, we should not throw the baby out with the bathwater and provide more loopholes for industry and fewer guardrails to protect and recovering species.

I look forward to this discussion today, and I yield back.

Ms. HAGEMAN. Thank you. I now recognize Chairman Westerman for his opening statement.

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

Mr. WESTERMAN. Thank you, Chair Hageman, and thank you to the witnesses for being here today for a very important hearing.

The Endangered Species Act and the Marine Mammal Protection Act, while well-intentioned, and while having done some good things and produced success over the years, must be refocused to their original intent. These two laws are designed to recover listing species and protect marine mammals. They were not intended to be blunt instruments weaponized against landowners, the energy sector, both traditional and new technologies, against the recreational and commercial fishing industries, against water users and infrastructure projects. These laws have been used to stop legitimate conservation efforts, including forest management, to improving salmon populations on free-flowing streams in tribal lands.

The Supreme Court's decision, as Chair Hageman said, in *Loper Enterprises v. Raimondo*, which overturned the Federal court's deference to Federal agencies' interpretation of broad laws like the ESA and the MMPA, highlights the responsibility this Committee has to address the ambiguity of our current laws by clarifying the limits of their authorities.

The MMPA is intended to protect marine mammals by preventing the take of the species, which the statute defines as "to harass, hunt, capture or kill, or attempt to harass, hunt, capture, or kill." While the law allows for the take of small numbers of marine mammals, the term "small numbers" is undefined, and has created an unworkable process not just for offshore energy but also in important fisheries management and coastal restoration work.

Simply put, the ESA and MMPA are too vague, and have given the U.S. Fish and Wildlife Service and the National Marine Fisheries Service the ability to put forward sweeping rulemakings with the force of law that stray from Congress' original intent.

Last Congress this Committee got the ball rolling on reforming the ESA. The biggest step forward was passing the ESA Amendments Act of 2024. This bill would have reauthorized and amended the ESA for the first time since 1988. The bill contained provisions that provided clarity on certain definitions, incentivized private landowners and States to invest in species conservation, and provided much-needed transparency in the decision-making process.

I am looking forward to the Committee examining both laws as we work to make the Federal permitting process more efficient and more effective.

I want to thank the witnesses again for your time today, and all the Members for your interest in these important issues.

And I yield back.

Ms. HAGEMAN. Thank you, Mr. Chairman. I now recognize Ranking Member Huffman for his opening statement.

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

Mr. HUFFMAN. Thank you, Madam Chair. And Madam Chair, thanks also for mentioning Article I of the Constitution in your opening remarks. We were beginning to think that our Republican friends didn't know about Article I, or maybe had forgotten about it, but that passing reference was the most meaningful affirmation of Article I we have heard from the Republican majority in this Congress, and maybe it is a start.

So in the month since Donald Trump was inaugurated, in addition to all of the chaos and illegality that has been the hallmark of this second Trump presidency, and shredding Article I of the Constitution at every turn, the Administration has waged an all-out assault on bedrock environmental protections like the Endangered Species Act and the Marine Mammal Protection Act and the scientists and the public servants tasked with enforcing them.

This Committee should be doing its job defending the separation of powers, Article I, and holding the Administration accountable for ignoring clear congressional directives. Instead, Natural Resource Republicans are trying to change the subject while recycling these same tired policy ideas that they have been pushing for decades.

Let's be clear. These laws are not just about wildlife. They protect clean air, clean water, and the natural systems that sustain us. When endangered species start blinking out, it is not just an ecological loss, it is a warning sign of broader environmental collapse. And when Republicans try and gut these protections, they are not just putting wildlife at risk, they are putting people at risk.

A few weeks ago, President Trump and his allies exploited the devastation of the Los Angeles wildfires to attack the Endangered Species Act and to falsely claim that they were shipping water to Southern California to fight fires. This week Committee Republicans are using the Supreme Court's *Loper Bright* ruling as an excuse to dismantle protections under the ESA and the MMPA.

Let's be clear about what *Loper Bright* actually did. It overturned the long-standing principle that courts should defer to agency interpretations of ambiguous statutes. It didn't repeal the ESA or the MMPA, it didn't strip these laws of their clear mandates, and it certainly didn't change the fact that Congress, this body, already directed agencies to rely on the best available science to protect endangered species and marine mammals.

The question we should be asking is this: Why do Republicans on this Committee continue to attack the very laws designed to prevent extinction? And the answer is simple. These laws spotlight inconvenient facts for certain powerful industries: mining companies, the oil and gas industry, corporate polluters who would rather squeeze out a little more profit for themselves no matter the cost to everyday folks and our planet.

Now, protecting wildlife and our environment means sometimes you have to say no. More often you have to say do it differently. But it also means holding industry accountable for habitat destruction, pollution, and climate impacts. Good environmental policy protects people. When polluters destroy ecosystems, fisheries collapse, putting fishermen, seafood industries, and coastal economies in jeopardy. When industry pollution wipes out pollinators like bees

and butterflies, agriculture suffers, driving up food prices, threatening food security for millions of people.

The numbers speak for themselves: one million species worldwide at risk of extinction. In the U.S., 40 percent of animals, 34 percent of plants on the brink, 25 percent of marine mammal species threatened with extinction due to human activities. The ESA works. Ninety-nine percent of listed species survive. And it is not just successful in saving iconic species like the bald eagle and the gray whale from vanishing forever, it is a proven safeguard against ecological collapse.

The MMPA works, restoring populations of humpback whales, sea otters, and manatees. These laws don't need fixing, especially not the kind of fix that our Republican colleagues are pushing, which is functionally repeal.

For those who put short-term profits over science, these laws can be inconvenient, and that is why we constantly hear these tired partisan refrains from across the aisle to repeal and to weaken these laws. Last Congress I sometimes triggered my colleagues across the aisle by calling them team extreme. The first month of the Trump administration I have to say they have made you folks look moderate. We have gone from team extreme to Mad Max.

We are running out of time. There is a biodiversity crisis right now. This is the time to support and implement these important environmental laws, not to gut them.

I yield back.

Ms. HAGEMAN. Thank you. I will now introduce our panel of witnesses.

Mr. John Vecchione, Senior Litigation Counsel at New Civil Liberties Alliance in Arlington, Virginia; Mr. Daniel Rohlf, Professor of Law at the Lewis and Clark Law School in Portland, Oregon; Mr. Paul Weiland, Partner at Nossaman LLP in Orange County, California; and Mr. Parker Moore, Principal at Beveridge and Diamond PC in Washington, D.C.

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 button on the microphone.

And we are using 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 of 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 the Member questioning begins.

I now recognize Mr. Vecchione for 5 minutes.

STATEMENT OF JOHN VECCHIONE, SENIOR LITIGATION COUNSEL, NEW CIVIL LIBERTIES ALLIANCE, ARLINGTON, VIRGINIA

Mr. VECCHIONE. Thank you. Chair Hageman, Ranking Member Hoyle, and members of the Subcommittee, thank you so much for the opportunity to provide my views on the implications of our clients' victories in *Loper Bright v. Raimondo and Relentless, Inc. v. Department of Commerce*, they were argued together, to provide the

Congress the opportunity to work its will, direct the executive branch, and, among other things, improve the implementation of the Marine Mammal Protection Act and the Endangered Species Act.

I worked many years to overturn *Chevron* deference, as has my organization, the New Civil Liberties Alliance. Now that that task has been accomplished, the Congress can reassert itself as the founders believed it would and should to set the course for law and policies of the Federal Government in protecting, exploiting, and managing the Nation's natural resources.

Since the momentous decision on June 28, 2024, I have been asked about the effect of the decision on administrative agencies and on lawmaking of the end of *Chevron* deference. Some commentators in the press have predicted the end of important environmental and social regulations, merely because the agencies are no longer able to create ambiguities or, worse, silences because they could fill silence with power that they hadn't been given, and then fill those ambiguities or silences with whatever regulations they like. This is not so.

Since the creation of the Interstate Commerce Act of 1887 to address the regulatory challenges of the transcontinental railroads, administrative regulatory power has been exercised by Congress and affirmed by the courts, including the Supreme Court. In 1946, the Congress passed, and President Harry Truman signed, the Administrative Procedure Act, the APA. When *Chevron* deference came along in 1984, Congress had been creating administrative agencies that made regulations covering huge swaths of American life, including securities, energy, the environment, natural resources for over 100 years. And *Chevron* was a case where Mr. Donziger, I know him, he is the lawyer who brought it, he wanted to say that the law meant that the Reagan administration could change in a way that was deemed better for industry.

And then the court said, no, we are going to defer to this agency, and if it is reasonable, you can go ahead. And at that time, they thought that *Chevron* deference was going to hurt the environment because of who the administration was. But Chief Justice Roberts' decision for the majority in *Loper Bright and Relentless* relied on the language of the APA to strike down *Chevron* deference.

I and my organization believe the Constitution itself forbids Article III courts from deferring to the interpretation of the law by the Article II executive branch.

It should be understood the majority opinion relied on this Congress' written will that "courts must decide all relevant questions of law." The case does not limit the ability of Congress to enact statutes to regulate, nor does it prevent constitutional delegation of authority to agencies. As Chief Justice Roberts said for the majority, "This is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. The holding of the case is that courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the executive branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitu-

tional limits, courts must respect the delegation while ensuring that the agency acts within it." But courts need not, and under the APA may not, defer to the agency interpretation because a statute is ambiguous.

And I am not going to say all my testimony, but I do want to emphasize something for this group. The court's *Loper Bright* decision that I think will be useful to this Committee is that they did say, and they think, that 180 degree changes of the law just because an administration changes but the law stays the same is a problem. So there is going to be a resistance to changing law when the statute doesn't change, and I really think that is the nub of what is going on here, and I think that is how we overturned *Chevron* deference. It was a scandal to the judicial mind that the statute stays the same, and then suddenly the regulation goes 180 degrees opposite.

So I will leave my written testimony. I have submitted it.

And the last thing I do want to say that, just for questioning, is that I read everyone else's testimony, and some of it dovetails. Mr. Rohlf's testimony says, hey, those Trump administration regulations may not be OK now without *Chevron*, and Mr. Weiland notes that the 1970s was the heyday of environmental regulation. If those regulations were interpreted back then, putting *Chevron* aside, the courts may see that as consistent with the language then.

So change without legislative action is going to be disfavored.

Ms. HAGEMAN. I appreciate that, Mr. Vecchione. I think that that is very good advice for the Members to take.

[The prepared statement of Mr. Vecchione follows:]

PREPARED STATEMENT OF JOHN J. VECCHIONE

Madam Chair Hageman, Ranking Member Hoyle, and members of the Subcommittee, thank you so much for the opportunity to provide my views on the implications of our clients' victories in *Loper Bright Enters., Inc. v. Raimondo/Relentless, Inc. v. Dep't of Com.*, 144 S.Ct. 2244 (2024) ("*Loper Bright/Relentless*"), to provide the Congress the opportunity to work its will, direct the executive branch and, among other things, improve the implementation of the Marine Mammal Protection Act and the Endangered Species Act. I worked many years to overturn Chevron deference, as has my organization the New Civil Liberties Alliance ("NCLA"). Now that that task has been accomplished, the Congress can reassert itself, as the Founders believed it would and should, to set the course for law and policies of the Federal Government in protecting, exploiting and managing the nation's natural resources.

Since the momentous decision on June 28, 2024, I've been asked about the effect of the decision on administrative agencies and on law making of the end of *Chevron* deference. Some commentators and the press have predicted the end of important environmental and social regulations merely because the agencies are no longer able to create "ambiguities" and then fill those ambiguities with whatever regulations they like. This is not so. Since the creation of the Interstate Commerce Act of 1887 to address the regulatory challenges of the transcontinental railroads, administrative regulatory power has been exercised by Congress and affirmed by courts, including the Supreme Court. In 1946 the Congress passed, and President Harry Truman signed, the Administrative Procedure Act (the "APA"). When *Chevron* deference came along in 1984, Congress had been creating administrative agencies that made regulations covering huge swaths of American life, including securities, energy, the environment and natural resources for over 100 years. *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc*. 467 U.S. 837 (1984). Chevron did not even mention the APA that Congress had explicitly enacted to control agency regulation and its adjudication by the Courts. Chief Justice Roberts' decision for the majority in *Loper Bright/Relentless* relied on the language of the APA to strike down *Chevron*

deference. While I and my organization believe that the Constitution itself forbids Article III courts from deferring to an interpretation of the law by the Article II executive branch, it should be understood that the majority opinion relied on this Congress's written will that "*courts* must 'decide all relevant questions of law.'" 5 U.S.C. § 706 (quoted in *Loper Bright/Relentless*, 144 S.Ct. at 2260) (emphasis in original).

The case does not limit the ability of Congress to enact statutes to regulate, nor does it prevent constitutional delegation of authority to agencies. As Chief Justice Roberts said for the majority "[This] is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has." *Id*. at 2268. The holding of the case is that "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id*. at 2273.

The subject of this hearing is "Evaluating the Implementation of the Marine Mammal Protection Act and the Endangered Species Act." I'm familiar with those two acts but have not litigated them as I have the Magnuson Stevens Act also within the Committee's jurisdiction. I'm not an expert on their provisions. However, *Loper Bright/Relentless* does not change the power of Congress to control agencies including the agencies with responsibility to implement these two statutes. It means that agencies will have to point to actual language and authority in a statute to support regulations or regulatory actions. The basics are probably well-known to this Committee. When Congress uses the words "the Secretary shall" do such and such it is taking away discretion. When it says the "Secretary may" do such and such it is granting discretion.

In the very first opinion of this Supreme Court term the Supreme Court analyzed how Congress grants discretion to agencies and withholds it. *Bouarfa v. Mayorkas*, 604 U.S. 6 (2024). In that case, Justice Jackson for a unanimous court notes the things Congress can do to grant wide discretion and also to cabin that discretion. The Court noted that Congress had stated the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any [visa] petition." *Id*. at 10 (quoting 8 U.S.C. § 1155). That case notes that the immigrant statutes is made up of "mandatory statutory rules paired with discretionary exceptions." *Id*. at 8. For the purposes of this Committee, courts are likely to interpret similar statutory language similarly. *Bouarfa* contrasts the broad discretion granted to the Secretary in revoking or not revoking visas for prior "sham marriage" violations with that granted to the Attorney General of the United States who can only exercise discretion for clemency after making certain findings of fact (such as the length of time the non-citizen has been in the country). *Id*. at 13-15.

The Endangered Species Act ("ESA") and the Marine Mammal Protection Act ("MMPA") directs the Secretary of the Interior or Secretary of Commerce, and through them the U.S. Fish and Wildlife Services ("FWS") and the National Marine Fisheries Service ("NMFS") to identify and take measures to protect various species of animals under threat of extinction. It uses language like I've described to instruct them on what they may do. For example, the Endangered Species Act states for recovery plans states

> The Secretary shall develop and implement plans . . . for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species.
>
> 16 U.S.C. § 1533 (f)(1).

In this case he shall, without discretion after he's listed a species, create a recovery plan unless he finds it won't help conserve the species. His actions would then be tested under the APA for making decisions or findings "arbitrarily or capriciously" or otherwise violating the law. It appears that much of the litigation over these statutes centers on whether the agencies are assessing risk to the various species accurately. *See e.g. Friends of the Animals v Williams*, 628 F.Supp.3d 71 (D.D.C. 2022) (remand to agency determine whether species of red macaw was endangered or threatened); *Friends of the Animals v. Ross*, 396 F.Supp.3d 1 (D.D.C. 2019) (remand to agency for further studies on type of conch's range).

Recently the D.C. Circuit explained how this body amended the ESA in 1979 to ease the tremendous economic damage it had caused in development of the TVA in

the famous "snail darter" case. *See Me. Lobstermen's Ass'n v. NMFS*, 70 F.4th 582, 596 (D.C. Cir. 2023) (describing original language of ESA and Congress's changes to correct after Supreme Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978)). They explain how Congress changed the original statutes "no exceptions" command to provide resort to better science and a concern for expense.

Under *Loper Bright/Relentless*, the secretaries of the agencies under these statutes will not be assumed to have legislative power whenever they wish to use ambiguous language in the statutes to change a regulation. *Chevron* deference meant that silence or ambiguity allowed the administrator to do anything the courts would deem "reasonable" within his purview. Now, he must state where Congress provided that power or discretion. In many cases in these statutes, it will have done so.

There are ways for Congress to prevent such discretion from being abused. First is requiring the Secretary to find certain facts as in *Bourfa* before exercising the discretion. In my example, I described one case where the ESA already does so. If Congress believes the secretaries are not taking a factor into account that should be taken into account, it can require them to do so. If it believes they are using a criterion that is not valid and does not lead to protecting species it can require him to use it.

There is one last consideration that concerns the Court's *Loper Bright/Relentless* decision that I think will be useful to this Committee. In that case, and in the effort to overturn Chevron deference, one result of that deference that struck judges and commentators as unfair was that the exact same law could mean regulations changed 180 degrees with a change in the administration. I believe the Supreme Court has signaled that when a new law or amendment is passed, the way the first administration deals with that law and issues regulations and interpretations of the new law is likely to set the tone and parameters of the regulatory scheme going forward. The Court went out of its way to note the "respect" the executive branch's interpretation of a statute "was issued roughly contemporaneously with enactment of the statute and remained consistent over time." *Loper Bright/Relentless*, 144 S.Ct. at 2258. The Courts are suspicious of vast changes in the obligations the same statute imposes when there has been no change in the statute by Congress. Vague language will no longer be allowed to empower the agencies. At oral argument in *Loper Bright*, Paul Clement posited that legislative compromise was being stymied partly because each side had incentive to assume when its party had the Presidency, any vagueness in the law would redound to its benefit. Whether he was right or wrong about that if there was such an incentive, it's gone now. Clarity on what the Congress wants will now be rewarded, and vagueness is unlikely to allow the Executive to work its will unchallenged by the Courts.

Congress no longer has any incentive to allow its statutory intent to be unclear in the hopes a friendly administration will be empowered to do what it did not clearly command and it also need not fear an unfriendly one can do anything it wants in that space. I thank you for this opportunity to lay out my thoughts on the new regulatory landscape.

QUESTIONS SUBMITTED FOR THE RECORD TO MR. JOHN VECCHIONE, SENIOR LITIGATION COUNSEL, NEW CIVIL LIBERTIES ALLIANCE

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

Questions Submitted by Representative Wittman

Question 1. With regard to the Loper Bright impact on MMPA, clarity is now required to ensure agencies don't follow Congress' intent but follow Congress' laws. We need to be able to preserve marine mammals. But also keep a variety of marine economies prosperous. Congress must take a more thorough approach to creating legislation that does both of those things. The onus is off Congress in that we can legislate with the same intended effects regardless of the tenant in the White House. In your opinion, does MMPA as is hold the specificity required by Loper Bright to ensure future Democrat administrations don't abuse MMPA rulemaking to hamper U.S. maritime industries? How does the MMPA with the overturning of Chevron create a need for regulation to prevent repeats of Biden-era MMPA regulations?

Ms. HAGEMAN. You will see that people are going to be coming in and out of the hearing today, and that is because they have votes in other committee hearings. So it is not that they don't have great interest in this subject. They do. And in fact, we are going to be addressing this in greater detail later today. But they do have to go to other Committees and vote. So they will be back for questioning. Thank you for your patience.

The Chair now recognizes Mr. Rohlf for his 5 minutes of testimony.

STATEMENT OF DANIEL ROHLF, PROFESSOR OF LAW, LEWIS AND CLARK LAW SCHOOL, PORTLAND, OREGON

Mr. ROHLF. Thank you for the opportunity to address this Subcommittee.

In the wake of the Supreme Court's decision in *Loper Bright*, this morning we have heard about supposed ambiguities in the Endangered Species Act. But the Supreme Court has examined this law and found it to be extremely clear. Indeed, the court emphasized that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." Most Americans agreed with this emphatic goal 50 years ago, and most Americans agree today.

The Endangered Species Act has been very effective, as we have already heard, and 90 percent of the listed species are making progress toward recovery at the rate envisioned in their recovery plans. But it takes time, resources, and cooperation between many parties to recover species facing extinction and restore their habitat.

In just the past few weeks, however, we have seen actions that threaten to derail both species recovery efforts, as well as slow down or even halt the decisions of many Federal agencies including permitting and other decision-making processes that affect the actions of landowners and businesses across the country. Haphazard mass layoffs and firings of Federal employees, including those who manage the habitat of many listed species, will leave many recovery actions undone and habitat unprotected. Though sold as increasing government efficiency, these cuts are incredibly inefficient. They save little money, and will inevitably slow down the biological analyses and permitting that must take place before actions that affect listed species can move forward, including many energy-related priorities of the current Administration.

And there is no ambiguity in the Endangered Species Act or in court opinions that apply its clear terms as to what happens if such analyses and permitting is not completed. Actions simply cannot go forward. For example, the National Marine Fisheries Service has a court-ordered deadline to produce a new Section 7 Endangered Species Act biological opinion examining oil and gas leasing in the Gulf of Mexico by this coming May. Layoffs, firings, and fork-in-the-road offers are undoubtedly pushing completion of this work and with it, the future of Gulf oil and gas activities in doubt.

This Gulf case also illustrates another way the Endangered Species Act is unambiguous. Unless the agencies base their decisions and conclusions on the best science, court will overturn them. This is what the Maryland District Court did when it found that

NMFS ignored its own experts and gave oil and gas activities a green light based on rosy assumptions about the future risk of oil spills.

Still, there are very likely ways that allow leasing and exploration to go forward with modest modifications to protect species such as Rice's whales, which lost 20 percent of its population in the last big oil spill. However, it takes dedicated Federal experts to chart such a path, and ongoing measures to fire or harass Federal employees mean that these experts may be gone.

Finally, the Supreme Court's *Loper Bright* decision may well play an important role in the Endangered Species Act in the near future. The President's Day one declaration of an energy emergency instructs agencies to rely on the ESA's emergency Section 7 consultation regulations for energy projects permitting. It also calls for ongoing meetings of the Endangered Species Committee, a body which has not convened for decades, to hand out exemptions from the ESA's protections.

However, in *Loper Bright*, as my colleague explained, the Supreme Court instructed Federal courts to provide their own best reading of Federal statutes, rather than to defer to how Federal agencies interpret the laws they implement. I am quite confident that courts applying this standard would have little difficulty in overturning agency actions consistent with the obviously flawed interpretation of the ESA set forth in the President's declaration.

In the end, there may not be unanimity in this room about whether to continue to support the goals of the Endangered Species Act. However, no matter if one's goals are to recover listed species or to expedite Federal permitting, it is also unambiguous that the actions of the executive branch and Elon Musk over the past few weeks will make both more difficult.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Rohlf follows:]

PREPARED STATEMENT OF PROFESSOR DANIEL J. ROHLF

Thank you, Chair Hageman, Ranking Member Hoyle, and members of the Subcommittee, for your invitation to speak to you today.

My name is Daniel Rohlf. I am a Professor of Law at Lewis and Clark Law School in Portland, Oregon, where I teach in our nationally regarded Environmental, Natural Resources, and Energy Law Program. Among other classes, I have taught Wildlife Law for 35 years, and with a colleague on our faculty co-founded Lewis and Clark's domestic environmental law clinic, Earthrise Law Center, nearly 30 years ago. For decades I have published and lectured widely on biodiversity law in general and the Endangered Species Act in particular.

The value of both biodiversity and the ESA

The United States remains a world leader in establishing and implementing laws to conserve biodiversity and thereby safeguard its ecological, economic, and cultural benefits to the Nation and its people. Over a half century ago, the Marine Mammal Protection Act (MMPA) was the first federal law—and one of the first in the world—to take an ecosystem approach to managing and protecting wildlife resources. A year later, the Endangered Species Act (ESA) underscored the country's commitment to avoiding human-caused extinctions of other species, and to protecting the ecosystems upon which those species depend. The idea behind these laws, however, is not to just benefit species that in some cases may sound obscure or far-away—it is aimed at preserving and recovering the intricate web of life that ultimately sustains us all.

Indeed, the economic and social benefits of protecting endangered species and marine mammals are as significant as conservation programs' ecological contributions. By protecting species and their habitats, we are ensuring that future genera-

tions will inherit a functional and vibrant environment—one that contributes to public health, well-being, and cultural richness of our society.

Species protection under the ESA has profound cultural and economic significance for many communities. In my home region, for example, the federal government signed treaties with many indigenous cultures to safeguard their fishery resources, including salmon and steelhead. Non-tribal commercial and sport fisheries have also sustained primarily rural communities along the West Coast and its watersheds for generations. While some critics—and Executive Orders—single out lessor known species such as delta smelt, many native fish species, including salmon and steelhead, are now listed as threatened and endangered as a result of human impacts on water quality and quality, as well as dams blocking fish from their formerly accessible habitat and similar declines in ecosystem function. Fortunately, the ESA is a key driver of efforts to improve native fish runs and the aquatic ecosystems that sustain them.

Clean and abundant water and functioning ecosystem services are, not surprisingly, just as important to human communities as natural ones. Therefore, the notion that the ESA's restoration efforts are the product of "radical environmentalism" putting fish over people is utterly false. The steps underway pursuant to the ESA to restore functional aquatic ecosystems in places such as California's Sacramento/San Juaquin River system and the Northwest's Columbia River Basin are benefiting local communities, economies, and indigenous cultures along with the endangered fish and other species that depend on these waterways. In contrast, performative gestures such as the unprecedented water releases from two federal reservoirs in California a few weeks ago simply imperiled downstream communities and wasted stored water that farmers could have used this spring.

In pure dollars and cents, functional ecosystems and their biodiversity are a foundation of our economy and create economic value in myriad ways. Pollinator species make agriculture possible. Charismatic species support ecotourism industries. Scavenger species provide waste removal services and prevent the spread of disease. Research by the World Economic Forum and PwC found that more than half of the world's total GDP is moderately or highly dependent on natural ecosystems and the services that they provide.[1] Individual species also provide examples of astonishingly valuable breakthroughs: The venom of Gila monsters—lizards in the desert Southwest whose populations are declining—inspired the diabetes management and weight-loss drug Ozempic; Caribbean sea squirts were key developing the chemotherapy drug trabectedin.[2]

While I can provide general summaries, I encourage members of the Subcommittee to seek out experts' opinions on the both the importance of biodiversity and the current state of this invaluable resource. Fortunately, a massive effort by scores of scientists to catalog the state of nature in the United States, including its contributions to human health and well-being—is nearing completion. Maddeningly, however, the White House recently intervened to prevent the National Nature Assessment, in the making for years by renowned experts who mostly donated their time, from being finalized and published. If this Subcommittee truly seeks to exercise oversight over the nation's water, wildlife, and fisheries, it should pressure the Executive Branch not to censor invaluable information on the state of these resources and the many benefits they provide to American citizens.

With threats to biodiversity increasing, particularly from climate change, we need a strong and effective legal framework to protect and restore species and their habitat. The ESA provides much of this legal safety net, and it works. While some critics complain about the pace of species delisted as recovered, this argument is political rather than biological and as such fails to consider the complexity of species recovery and the time required to actually accomplish it. Many listed species' recovery timelines frequently span 30–50 years or more. Approved recovery plans, on average, anticipate that full recovery of listed species will take 46 years, while the average time that species have been listed is 32 years.[3] In fact, about 90% of protected species are recovering at the pace projected in their recovery plans, a remark-

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[1] WORLD ECONOMIC FORUM & PWC, NATURE RISK RISING 8 (2020), https://www3.weforum.org/docs/WEF_New_Nature_Economy_Report_2020.pdf.

[2] Craig Russell, *Wegovy Was Inspired By Gila Monster Venom—Here Are Some Other Drugs With Surprising Origin Stories*, CONVERSATION (Sept. 5, 2023), https://theconversation.com/wegovy-was-inspired-by-gila-monster-venom-here-are-some-other-drugs-with-surprising-origins-208630.

[3] CTR. FOR BIOLOGICAL DIVERSITY, THE ENDANGERED SPECIES ACT: 50 YEARS OF EXTRAORDINARY SUCCESS (2023), https://www.biologicaldiversity.org/publications/papers/The-Endangered-Species%20Act-50-Years-of-Extraordinary-Success.pdf.

ably high success rate that few laws can boast.[4] Overall, the ESA has prevented extinction of nearly all of the species on its protected lists, even those belatedly added to the roll of listed species after years of unnecessary delays.[5,6]

Budgets, agency personnel, and species recovery

While the ESA provides a strong legal framework for protecting and restoring species and the ecosystems these creatures—and humans—depend on, accomplishing these goals requires both adequate funding and dedicated people to carry out the day-to-day work of recovery. Yet ESA implementation suffers from chronic underfunding, delaying listing and recovery efforts. A recent study noted that species are often not protected until their populations have already dwindled to dangerously low levels, making recovery more time-consuming and difficult; nonetheless, the study also found that recovery funding per species dropped nearly 50% between 1985 and 2020.[7] The total annual budget for recovery of over 1,500 species is only $82 million, while a detailed analysis of federal recovery plans reveals that fully implementing the steps outlined in these plans would cost approximately $2.3 billion a year. While this figure sounds like a substantial amount of money, it is roughly the funding comparable to federal subsidies provided to oil and gas companies on public lands in 2015, or slightly less than the sum Elon Musk receives in a month.

These funding shortfalls, not problems with the ESA itself, are the culprit behind delays in species recovery. For example, the small whorled pogonia, a rare orchid, has made substantial progress toward recovery but with funding shortages has become a victim of its own conservation success. Although the species is doing well, it has become a low priority for funding compared to more imperiled species, leaving critical final recovery steps—such as land acquisitions and management commitments—unfunded.[8] This both hinders final recovery efforts for the species and forces federal agencies and others to continue to have to follow the ESA's procedures and protections for the species that would no longer be necessary if the plants were delisted as recovered on a timely basis. Thus, proper investment in recovery not only hastens species recovery, it streamlines processes and limitations that some label as the "red tape" associated with ESA compliance.

While inadequate funding has long stymied efforts to conserve species under the ESA, this problem is becoming exponentially more significant in light of the ongoing staffing cuts within FWS and NMFS, the agencies responsible for implementing the ESA. These cuts present a significant threat to the progress achieved under the ESA, and if left unaddressed, could reverse the recovery of numerous species and undermine efforts to prevent more species from being listed as endangered or threatened. If the Committee wishes to conserve species and prevent extinctions, rather than weakening a conservation statute passed with bipartisan support, its members should take action to ensure that the Services maintain the staffing and expertise necessary for implementing the statute.

Earlier this month, the Trump administration purged hundreds of employees from the FWS. These layoffs come on top of thousands of resignations by Interior Department employees—many of whom were FWS employees—compelled by the president's and Elon Musk's "Fork in the Road" choice to resign immediately from what many consider their dream jobs with perhaps a few months' pay or face termination. Meanwhile, NOAA is facing its own severe layoffs, budget cuts, and even perhaps complete elimination. These cuts threaten the agency's ability to perform essential functions such as listing and delisting marine species, issuing biological opinions, approving habitat conservation plans, and managing species on a proactive basis in order to prevent them from becoming threatened or endangered. A former head of FWS noted that among the FWS employees recently fired by the Trump administra-

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[4] *Id*. at 6.

[5] KIERAN SUCKLING ET AL., CTR. FOR BIOLOGICAL DIVERSITY, A WILD SUCCESS: A SYSTEMATIC REVIEW OF THE ENDANGERED SPECIES ACT'S EFFECTIVENESS (2016), https://biologicaldiversity.org/campaigns/esa/pdfs/WildSuccess.pdf.

[6] CTR. FOR BIOLOGICAL DIVERSITY, THE ENDANGERED SPECIES ACT: 50 YEARS OF EXTRAORDINARY SUCCESS (2023), https://www.biologicaldiversity.org/publications/papers/The-Endangered-Species%20Act-50-Years-of-Extraordinary-Success.pdf.

[7] Center for Biological Diversity, Shortchanged: The Underfunding of the Endangered Species Act 3 (2016), available at https://www.biologicaldiversity.org/programs/biodiversity/pdfs/Shortchanged.pdf.

[8] *Id*.

tion were biologists working to conserve native bird species in Hawaii that are "about to blink out" of existence.[9]

Even further, the White House has made no secret of its belief that it can impound funds already allocated and appropriated by Congress. Conservation efforts for these and many other species may be doomed if Congress does not defend the funding that it—and, through it, the people of the United States—have allocated toward actions to recover threatened and endangered species. In addition to doing lasting and perhaps irrevocable harm to vulnerable species, dismantling the Services through decimating their staffs and impounding their budgets will seriously impair their ability to do the work they must do in order to approve federal agency actions, including actions that are consistent with the current administration's "energy dominance" agenda. Put simply, federal oil and gas leasing programs must comply with the law, which requires agencies conducting energy-related activities to consult with the Services about potential impacts to listed species and their critical habitat. Withdrawing resources and eliminating personnel from the Services will therefore slow other federal actions such as energy development and permitting for other economic development activities. Underfunding and understaffing also have far-reaching legal consequences, resulting in further delays in species recovery efforts, costly legal settlements when courts halt agency actions for failing to comply with the law, and unsustainable burdens on remaining agency personnel.

The ongoing cuts to FWS and NMFS staff and the threats to the budgets to these agencies notwithstanding funding decisions made by Congress present an unprecedented threat—not only to the future of species recovery and agencies' ability to carry out steps essential to everyday permit processes, but to our democracy itself. Congress, including the members of this Subcommittee, must fulfill its responsibility to uphold the laws of the United States. Doing so is fundamental to maintaining the separation of powers in our constitutional system and ensuring that lawmakers maintain the power of the purse on behalf of the American people. I urge members of this Subcommittee to prioritize the restoration of adequate staffing levels for these agencies, and I call upon members to fulfill their oaths to defend the Constitution by ensuring that the monies appropriated by Congress are allocated and spent by the Executive Branch for their intended purposes.

Supreme Court's Decision in Loper Bright

Last year, the U.S. Supreme Court issued its decision in *Loper Bright Enterprises v. Raimondo*,[10] which changed administrative law by announcing a new standard for federal courts to review federal agencies' interpretations of statutes they implement. Overruling a long-standing decision by the Court, the majority concluded that courts should no longer apply what had become known as *Chevron* deference to agencies. This standard held that federal judges should defer to "reasonable" agency interpretation of federal laws that were not clear and unambiguous on their face.

Disputes in federal court that arise under statutes such as the Endangered Species Act raise two kinds of questions for judges to resolve. The first type involves application of the ESA's requirements in specific factual situations. In such cases, a court defers to the decision of a federal agency, including FWS and NMFS, unless the judge determines that the agency had acted arbitrarily or capriciously by failing to articulate a rational connection between facts in the agency's record and conclusions the agency drew. Even applying this demanding standard, courts sometimes find that agencies have not properly applied the law in specific instances. Such results were particularly common for ESA decisions made during the first Trump Administration. For example, federal courts overturned biological opinions examining operation of the federal dams in California's Central Valley Project as well as oil and gas leasing and exploration in the Gulf of Mexico. Such judicial scrutiny is essential to ensuring that science rather than political expediency governs how agencies balance the ESA's conservation requirements with other goals—as the law requires.

Other court cases involve how to properly interpret the law itself. In such instances, the *Loper Bright* opinion puts more responsibility on federal judges to discern the meaning of federal laws rather than simply deferring to federal agencies' view of the law's meaning as long as an agency set forth a "rational" reading of a statute. Though courts must still consider agencies' "body of experience and informed judgment," federal judges must now employ standard legal tools of statutory

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[9] Benji Jones, Trump's Job Cuts at This Overlooked Agency Put Every American at Risk, VOX (Feb. 21, 2025), https://www.vox.com/down-to-earth/400608/trump-doge-jobs-layoff-fish-wildlife-service.

[10] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

interpretation to arrive at their own decisions on the best reading of a law's meaning.

While Congress is of course able to create, amend, or repeal federal laws as it sees fit for the benefit of the American people, the *Loper Bright* decision creates no particular need to amend the ESA. The statute has existed in essentially its present form since 1988, and courts have long-since resolved most key questions regarding its meaning—the type of precedents that the Supreme Court in *Loper Bright* noted should remain in place even if they had relied on Chevron deference. Going forward, courts will resolve any remaining issues that arise using traditional legal tools of statutory interpretation, including looking at the statute itself as well as the intent of Congress when it enacted the relevant legal provisions.

One of the first noticeable effects of *Loper Bright* in the context of the ESA is likely to be—and should be—judicial skepticism over ways that the Trump Administration has in the past, and is currently, interpreting the statute. For example, regulatory changes made during the first Trump Administration removed restrictions on FWS and NMFS from discussing their estimates of economic costs caused by listing a species as threatened or endangered in the course of making decisions on whether to add species to these lists. While in the past courts would have had to defer to this view of the statute if they found it to be at least reasonable, now judges must reach their own best reading of the law. In such a case, a court will almost undoubtedly throw out a similar regulation if the new Administration seeks to reinstate it (after it was repealed two years ago). Since the ESA expressly provides that the Services must make listing decisions "solely" on the basis of the best science available,[11] *Loper Bright* will almost certainly mean that federal courts will reject such a back-door effort to introduce non-biological factors into listing decisions. Similarly, recent Executive orders that call for extensive use of the ESA's section 7 emergency consultation procedures and formation of a standing Endangered Species Committee to hand out frequent exemptions from section 7(a)(2)'s requirements will likely not stand in light of *Loper Bright's* raised bar for judicial scrutiny of agencies' interpretation of the law.

Marine Mammal Protection Act

The ESA, if properly funded, can be a powerful tool for conserving imperiled species—but it is not the only federal statute that plays a vital role in protecting our nation's wildlife. The Marine Mammal Protection Act (MMPA) prohibits the "take" of marine mammals and gives NMFS the task of authorizing exceptions to this prohibition only after an agency or other entity meets specific mitigation and minimization requirements. The MMPA provides an additional layer of protection for marine mammal species also protected under the ESA, and extends protections to marine mammals that are not listed under the ESA.

Disasters caused by human activities illustrate the perils that marine species face. In 1989, the Exxon Valdez oil spill caused the deaths of an estimated 300 harbor seals and twenty-two killer whales in Prince William Sound.[12] Just over two decades later, the Deepwater Horizon oil spill devastated marine communities in the Gulf of Mexico, killing about one in five Rice's whales and setting off an enormous cetacean die-off.[13] The MMPA is a crucial safeguard against future mass mortality events, and its protections should continue to provide additional protections for whales, dolphins, and other marine mammals. NMFS has taken steps to streamline the process of administering the MMPA. For example, NMFS has created NEPA categorical exclusions for certain, low-impact incidental take authorizations under the MMPA. In doing so, NMFS has helped to ensure that the MMPA is administered efficiently, benefiting both marine species and development interests.

Conclusion

The Endangered Species Act and Marine Mammal Protection Act provide key legal protections for the benefit of not only imperiled species and marine creatures, but for all Americans. Congress should not only protect staffing levels and agency budgets for implementing these laws to both protect species and ensure orderly permitting and decision-making, it should increase funding allocated for species recovery. Such actions would preserve Congress's constitutional authority in our democracy and protect species and ecosystems for our children and grandchildren.

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[11] 16 U.S.C. § 1533(b)(1)(A).

[12] *Exxon Valdez*, NOAA (Aug. 17, 2020) https://darrp.noaa.gov/oil-spills/exxon-valdez.

[13] Rice's Whale: In the Spotlight, NOAA FISHERIES (Nov. 26, 2024) https://www.fisheries.noaa.gov/species/rices-whale/spotlight.

QUESTIONS SUBMITTED FOR THE RECORD TO DANIEL ROHLF, PROFESSOR OF LAW AND DIRECTOR, EARTHRISE LAW CENTER

Questions Submitted by Representative Stansbury

Question 1. Mr. Rohlf, I was struck reading a piece you wrote on the 40th anniversary of the ESA that you reference not only the legal, but moral imperative of protecting species—as our country faces an unprecedented time, why do you think we need to protect the Endangered Species Act?

Answer. This responds to a written question from Rep. Stansbury based on my testimony before the Subcommittee on February 26, 2025.

More than a half century after a Republican president signed the Endangered Species Act into law, Members of Congress should not only affirm the nation's commitment to recovering threatened and endangered species and the ecosystems upon which those species depend, lawmakers should strengthen species and ecosystem protection efforts by increasing funding for conservation measures and the agencies that carry them out.

Our country does indeed face an unprecedented time in many ways. The current occupant of the White House vows to make the country great, but at the same time issues orders that call for putting people "over" other species and denigrating those who care about protecting creatures from extinction as "radical environmentalists." Yet all around us there are warning signs that both people *and* the natural world are increasingly in harm's way. Unprecedented floods, fires, and storms fueled by climate change have ended or uprooted the lived many Americans and caused billions upon billions of dollars in damage. At the same time, the country faces a related biodiversity crisis—a 2023 NatureServe report found that a third of our plants, 40% of animals in the United States, and over 40% of our ecosystems are facing range-wide collapse. This trend will not lead to greatness. On the contrary, it will continue to impose enormous costs on our society—both in terms of lives and dollars, as well as in aesthetic and moral terms. On the other hand, restoring species and ecosystem function creates natural capital and increases economic well-being.

Restoration of the Klamath River ecosystem provides an excellent example of the promise—and unfinished business—of the Endangered Species Act. Led by tribes in the region who have stewarded and relied on the river's resources for thousands of years—along with ESA protections for both Klamath salmon and native fish that live in headwaters lakes—removal of four dams that had outlasted their useful lives was completed last summer. Thousands of salmon are already colonizing the renewed habitat, exceeding scientists' greatest expectations and heralding the beginning of a return of abundant tribal and commercial fisheries that have been only a memory. Early rafting expeditions have both cataloged the return of eagles, herons, and other wildlife and signaled the start of renewed recreational opportunities on the river. In December, work began in the upper Klamath Basin to restore wetlands that not only provided habitat for untold numbers of juvenile salmon and migratory birds, but helped store water in increasingly hot summers and replenish groundwater that increasingly serves as the only water available to the area's decreasing number of farmers. However, the Trump Administration recently cut off funding allocated under the bipartisan infrastructure bill passed by Congress in 2021 that was enabling the next crucial steps in restoring a functional Klamath ecosystem and improving conditions for both the basin's wildlife and the people who live there.

As in the Klamath, across the country the Endangered Species Act is a catalyst for actions that benefit species facing extinction as well as the human communities that ultimately rely on a healthy environment. However, senseless attacks on the ESA, funding to implement recovery and restoration measures, and the agencies responsible for the law's implementation by the Trump Administration and Republicans in Congress threaten to derail this progress.

True leaders recognize the wisdom of pioneering ecologist Aldo Leopold, who called for people to recognize that humans are simply members of the Earth's biotic community—our fate is tied to the fate of all life on the planet. Thus, protecting and strengthening the Endangered Species Act ultimately benefits us.

Ms. HAGEMAN. Thank you. The Chair now recognizes Mr. Weiland for 5 minutes.

STATEMENT OF PAUL WEILAND, PARTNER, NOSSAMAN LLP, IRVINE, CALIFORNIA

Mr. WEILAND. Good morning, Subcommittee Chair Hageman and members of the Committee. My name is Paul Weiland, and I am a partner in the Irvine, California office of Nossaman, LLP.

Prior to my time at Nossaman I was in the law and policy section in the Environment and Natural Resources Division of the U.S. Department of Justice. My testimony here is based on my experience working with Federal wildlife agencies across the Nation, including experience with the Marine Mammal Protection Act and Endangered Species Act. My testimony represents my views as an individual, and does not necessarily represent the views of my firm or my clients.

The MMPA and ESA were enacted during the 1970s, a decade that represents the high water mark for passage of environmental laws by Congress. Both laws reflect a high degree of optimism in Congress regarding the Nation's ability to accomplish ambitious conservation goals, while achieving other societal objectives. In addition, both laws lack specificity and have been subjected to limited congressional reauthorization. Consequently, the other branches of government, as my colleagues have already mentioned, have played an outsized role in the evolution of these laws.

In implementing both the MMPA and ESA, the National Marine Fisheries Service and U.S. Fish and Wildlife Service have frequently drifted from value neutral assessment of information regarding the status of species and the effects of human activities on them to the application of the precautionary principle. The essence of this principle, as applied in the context of the two Acts, is the notion that one should draw all inferences in a manner that tends to underestimate the distribution and abundance of species, and overestimate the effects of myriad human actions on those species.

In shorthand, the agencies have often referred to this precautionary approach as giving the benefit of the doubt to the species.

The precautionary principle is ingrained in agency culture and reflected in a wide range of agency rules, guidance, and other activities. In *Maine Lobstermen Association v. National Marine Fisheries Service* decided in 2023 by the United States Court of Appeals for the D.C. Circuit, the court held that it is a blunt tool, and that the precautionary approach can distort decision-making, and therefore that it is unlawful under the Endangered Species Act.

In my written testimony, I described three examples of instances where agency reliance on the precautionary principle led to unlawful action. One of those examples is the National Marine Fisheries Service Vessel Speed Rule. NMFS adopted the initial vessel speed rule for right whales in 2008, imposing a speed limit of 10 knots on most vessels equal to or greater than 65 feet in length along much of the eastern seaboard to reduce the likelihood of collisions with right whales. In 2022, the agency proposed to expand the rule to vessels between 35 and 65 feet in length, and to a more expansive geographic area that encompassed much of the eastern

seaboard. In January 2025, the agency withdrew its proposed rule, but the 2008 rule remains in effect.

In the 2022 proposed rule, NMFS reported that between 2008 and 2022 there were 5 right whale vessel strikes involving vessels between 35 and 65 feet in length. During that same period of time there were more than 5.1 million offshore fishing trips along the eastern seaboard by vessels between 35 and 65 feet in length. These data demonstrate that the probability that a vessel between 35 and 65 feet in length operating on the eastern seaboard would strike a right whale is less than 1 in a million. The proposed rule exemplifies one circumstance in which the precautionary principle can result in an absurd outcome. That is, when the regulation of a vast amount of human activity that causes no harm occurs for the purpose of curbing a minuscule amount of human activity that causes harm.

Even more problematic is the lack of legitimate basis in the MMPA or ESA for either rule. This is a topic that Mr. Moore deals with in detail in his written testimony.

NMFS and the Fish and Wildlife Service do face substantial challenges as they implement the MMPA and ESA, but that is not grounds for giving the agencies a pass when their actions are premised on an approach to decision-making that puts a thumb on the scale, rather than relying on the best available scientific information.

Thank you for the opportunity to share my views. I am happy to answer any questions.

[The prepared statement of Mr. Weiland follows:]

PREPARED STATEMENT OF PAUL WEILAND, NOSSAMAN LLP

My name is Paul Weiland, and I am a partner in the Irvine, California office of the law firm Nossaman LLP. I have been an associate and then partner at Nossaman for over 20 years. Prior to my time at Nossaman, I was an attorney in the Law and Policy Section in the Environment and Natural Resources Division of the U.S. Department of Justice.

My testimony is based on my experience working on federal wildlife issues across the nation, including experience and familiarity with the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA). My testimony represents my views as an individual and does not necessarily represent the views of my firm, Nossaman, or my clients.

The MMPA and ESA were enacted during the 1970s, a decade that represents the high-water mark for passage of environmental laws by Congress. Both laws reflect a high degree of optimism regarding the nation's ability to accomplish ambitious conservation goals while achieving other societal objectives. In addition, both laws lack specificity and have been subject to limited Congressional reauthorization; consequently, the other branches of government have played outsized roles in their respective trajectories.

In implementing both the MMPA and ESA, the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) have frequently drifted from value-neutral assessment of scientific information regarding the status of species and the effects of human activities on them to application of the precautionary principle, when confronted with substantive uncertainties. Like many broad policy principles, the precautionary principle means different things to different people, but two common formulations are: (1) lack scientific certainty should not be a basis for failure to regulate an action that poses a risk of harm to the environment and (2) if there is a risk of harm to the environment due to an action, the action should not proceed. The essence of that principle as applied in the context of the MMPA and ESA is the notion that one should draw all inferences in a manner that tends to underestimate the distribution and abundance of protected species, overestimate the effects of myriad actions on those species, and, even, over- or under-estimate the effects of measures intended to yield benefits for the species. In shorthand, NMFS

and USFWS have often referred to this precautionary approach as giving the benefit of the doubt to the species.

The precautionary principle is engrained in agency culture and reflected in a wide range of agency rules, guidance, and other activities. In *Maine Lobstermen's Association v. National Marine Fisheries Service*, decided in 2023, the United States Court of Appeals for the D.C. Circuit held that applying the principle is a blunt tool that can distort the decision-making process and is, therefore unlawful. The case involved a challenge to a 2021 biological opinion issued by NMFS regarding the effects of several fisheries along the East Coast on species listed under the ESA, including effects of the lobster fishery on the North Atlantic Right Whale. NMFS explained that when analyzing the effects of the lobster fishery on the Right Whale, it resolved uncertainties in favor of the species. The D.C. Circuit rejected that approach, reasoning that the role of NMFS when issuing a biological opinion under section 7 of the ESA is to provide expert assistance by making predictions about the effects of the proposed action on the listed species using the best available scientific information.

Below I discuss three examples of reliance on the precautionary principle to justify agency decision-making under the MMPA and ESA that are, in my view, unlawful.

Right Whale Vessel Speed Rule

One example of reliance on the precautionary principle to justify agency decision-making is the NMFS vessel speed rule. NMFS adopted the vessel speed rule in 2008, imposing a speed limit of 10 knots on most vessels equal to or greater than 65 feet in length across a number of geographic areas along the Eastern Seaboard to reduce the likelihood of death or injury of Right Whales due to vessel collisions. In 2022, NMFS proposed to expand the vessel speed rule to smaller vessels 35 to 65 feet in length and to a more expansive geographic area that includes the coasts of every state on the Eastern Seaboard from Florida to Massachusetts. In January 2025, NMFS withdrew the proposed rule though the 2008 rule remains in effect.

The purpose of the rule, according to NMFS, is to reduce Right Whale mortality. The range of the Right Whale population in the Atlantic Ocean extends from coastal waters in the United States and Canada across the Atlantic to coastal waters of northern Europe though scientists believe the population is concentrated along the Eastern Seaboard of the U.S. and Canada. The species experienced a significant population decline due to whaling in the 19th and 20th centuries, but the population made progress toward recovery over the period 1990–2010. Since 2010, the population has declined from an estimated 470 whales to 370 whales. Vessel strikes and entanglement in fishing gear are believed to be the two leading causes of Right Whale mortality though estimates generated from modeling are freighted with uncertainty.

In its 2022 proposed rule, NMFS reported that between 2008 and 2022 there were 12 Right Whale vessel strikes in U.S. waters. The agency further indicated that 5 of these 12 strikes involved vessels between 35 and 65 feet in length. During that same period, there were more than 5.1 million offshore fishing trips along the Eastern Seaboard by vessels 35 to 65 feet in length. These data demonstrate that the probability that a vessel between 35 and 65 feet in length operating along the Eastern Seaboard would strike a Right Whale is less than one in a million.

The proposed rule exemplifies one circumstance in which the precautionary principle can result in an absurd outcome, that is, when it leads to regulation of a vast amount of human activity that causes no harm for the purpose of curbing a miniscule amount of human activity that causes harm. An analog would be the imposition of a speed limit on roads within Desert Tortoise habitat across the American Southwest. Even more problematic is the lack of a legitimate legal basis in the MMPA or the ESA for either vessel speed rule. In both rules, NMFS references provisions that grant the agency general rulemaking authority. Section 112(a) provides NMFS with authority to promulgate regulations that are "necessary and appropriate" to carry out the purposes of the MMPA. And section 11(g) provides NMFS authority "to promulgate regulations as may be appropriate to enforce" the ESA. But these sources of authority do not provide the agency with authority to act as a legislative body; they are subject to the major questions doctrine and nondelegation doctrine that are rooted in the separation of powers reflected in the Constitution.

Turning first to the MMPA, that Act does not authorize NMFS to promulgate rules that prohibit conduct that has a very remote probability of causing "take" of marine mammals. In fact, the legislative history of the MMPA and regulations promulgated by NMFS both establish that accidental take is not prohibited under the MMPA. For example, the legislative history of the MMPA includes the statement

that "take" under the MMPA "is not intended to mean the killing of a marine mammal by a vessel or its appurtenances as the result of an accident or Act of God." House Conf. Rep. 92-1488. Consistent with this legislative history, NMFS regulations define "take" under the MMPA to extend to "the negligent or intentional operation of an aircraft or vessel." 50 C.F.R. 216.3. A vessel collision with a Right Whale, which has a very low probability of occurring, is *de facto* accidental and, therefore, cannot be prohibited "take." To wit, the prohibition of a million vessel trips that occur without a collision with a Right Whale to prevent a single vessel trip that leads to an accidental collision with a Right Whale is not a legitimate exercise of regulatory authority.

Turning next to the ESA, the Act does not authorize NMFS to promulgate rules that prohibit conduct that has a very remote probability of causing "take" of listed species. Rather, section 9 of the ESA prohibits "take" of endangered species. The means (or "policy instruments") that Congress included in the ESA to implement the "take" prohibition are twofold: the enforcement provisions in section 11 that authorize NMFS as well as citizens to initiate lawsuits to enforce the prohibition and the procedures in section 7 and 10 that provide processes for entities undertaking federal and non-federal actions, respectively, to obtain authorization for "take" incidental to otherwise lawful activity. Those means that Congress included in the ESA do not include regulations to prevent take. The vessel speed rule purports to impose an enforceable requirement on vessel operators under the ESA, even when those operators have not engaged in prohibited take of Right Whales and there is a *de minimis* risk that their conduct could result in prohibited take. Further, compliance with the rule does not immunize the vessel operator from liability for take in the unlikely event that even operative at the slower speed the vessel collides with a Right Whale.

Negligible Impact Determination

A second example of reliance on the precautionary principle to justify agency decision-making is the guidance on negligible impact determinations under the MMPA issued by NMFS in 2020. Section 102 of the MMPA generally prohibits "take" of marine mammals and section 3 defines "take" to include the actual or attempted harassment, hunting, capturing, or killing of marine mammals. However, section 101 of the MMPA includes exceptions to the "take" prohibition. Among these is section 101(a)(5)(E), which provides that NMFS shall allow the incidental taking of ESA listed marine mammals by persons using vessels of the United States and those vessels which have valid federal fishing permits while engaged in commercial fishing if NMFS makes certain determinations. Section 101(a)(5)(E) applies in tandem with section 118 to commercial fishery operations that impact ESA listed marine mammals.

Under section 101(a)(5)(E), NMFS must determine, after notice and an opportunity for public comment, that: (1) incidental mortality and serious injury from commercial fisheries will have a "negligible impact" on the affected marine mammal; (2) a recovery plan has been developed or is being developed for the marine mammal under the ESA; and (3) where required under section 118 of the MMPA, a monitoring plan has been developed and a take reduction plan has been developed or is being developed for such marine mammal. In other words, NMFS is required to make a negligible impact determination in order to authorize take due to commercial fishery operations.

Section 118, meanwhile, imposes additional requirements governing the taking of marine mammals incidental to commercial fishing. For example, under section 118(f)(1), the Secretary must "develop and implement a take reduction plan designed to assist in the recovery or prevent the depletion of each strategic stock which interacts with a commercial fishery." These take reduction plans are developed by take reduction teams and must include information on the number of animals being killed or seriously injured annually, recommended measures to reduce mortality and serious injury, and recommended dates for achieving the plan objectives.

As this very brief description of the regulatory requirements applicable to commercial fishing operations under the MMPA demonstrates, there are layers of requirements applicable to such operations. The requirement that incidental mortality and serious injury from commercial fishery operations will have a "negligible impact" on the affected species or stock is but one of these requirements, but it has outsized importance due to NMFS's interpretation of the specific provision. To begin with, the negligible impact determination guidance is notable because it interprets the term "negligible impact" as applied to commercial fisheries but was not subjected to notice and comment. But more importantly, the guidance establishes

a negligible impact threshold for commercial fisheries that is unduly burdensome and, in some instances, unattainable. The formula for that threshold is:

$$NIT_s = N_{min} \times 0.5 R_{max} \times 0.013$$

where NIT_s is the negligible impact threshold for a single fishery, N_{min} is the minimum abundance estimate for the species or stock, and R_{max} is the maximum net productivity of the species of stock.

At each step, NMFS builds in an assumption based on the precautionary principle. So, with respect to abundance, rather than use the most likely abundance estimate, NMFS uses the minimum abundance estimate. NMFS then multiplies this minimum abundance estimate by one-half the maximum net productivity rate (where the maximum net productivity rate is the rate that will result in the optimum sustainable population of the species, a term defined in section 3 of the MMPA). Finally, as NMFS acknowledges expressly in the guidance, the agency multiplies the first two variables by 0.013 (or 1.3 percent) to generate a negligible impact threshold for the specific fishery under consideration. By purposely tipping the scale at each step, NMFS compounds its distortion of the decision-making process.

The negligible impact determination guidance has the effect of curtailing or possibly shutting down commercial fisheries. The exercise of such authority, which has vast economic significance, arguably goes beyond the authority delegated to NMFS by Congress. In addition, the exercise of such authority via guidance rather than rulemaking that is subject to notice and comment arguably is an end run around the requirements of the Administrative Procedure Act. Finally, use of the precautionary principle at each step in the process of making negligible impact determinations distorts the decision-making process by inflating the effects of any given commercial fishery on a protected marine mammal and causing needless economic dislocation across multiple commercial fisheries.

Bone Cave Harvestman Listing

A third example of reliance on the precautionary principle to justify agency decision-making is the continued listing of the Bone Cave Harvestman by USFWS as an endangered species under the ESA. The Bone Cave Harvestman is a pale, orange, eyeless harvestman that is evolutionarily adapted to spending its entire life in subterranean cave and crevices in the Balcones Canyonlands in portions of Travis and Williamon Counties, Texas. Very little is known about the species despite the fact that it has been listed for more than 35 years. For example, scientists do not understand its reproductive habits, its life span, or the size of the species' historical and contemporary populations. Further, there exists no data or analyses providing any indication whether the populations of the species are growing or in decline or whether the species' range has expanded or contracted over time other than data regarding simple presence or absence in known caves.

USFWS first listed the Bone Cave Harvestman in 1988 under the name Bee Creek Cave Harvestman. At the time of the listing, the only known occurrences of the species were in five or six caves. In deciding to list the species on an expedited basis, USFWS described urban, industrial, and highway expansion in the area of the recorded occurrences as a threat to the species. In 1993, USFWS recognized the Bone Cave Harvestman as a separate species and published a final rule listing it as such.

In the years after its initial listing, occurrences of the species doubled from 6 to 12 then doubled again from 12 to 24, then doubled again from 24 to 48, then doubled again from 48 to 96, and then doubled again from 96 to 192. The number of known occurrences now exceeds 225 caves and crevices. Common sense dictates that the species, once though to be rare, is routinely detected within the cave habitat available to it. Further, while little is known about the species and its population dynamics, conservation biology suggests that each occurrence detected does not only represent the single individual identified but rather is representative of a population in that discrete cave or crevice, or cluster of caves and crevices. In other words, hundreds of individual detections does not amount to hundreds of individuals as it might for a species such as the Grizzly Bear; instead, it amounts to many dozens or perhaps even hundreds of populations within a meta-population.

At the same time, the primary threat to the species identified by USFWS—development in the region—has continued apace with the growth in number of species occurrences since the time of listing. Concrete evidence to support the hypothetical threat posed by development to the continued existence of the Bone Cave Harvestman remains elusive. For example, the species continues to persist in: Inner Space Caverns, a large commercial cave located under Interstate 35 which receives

100,000 visitors annually; in 25 caves located in a golf and retirement community; and in a cave feared by USFWS in 1988 to no longer exist due to a roadway extension, and in several caves located under a large state highway.

On the other hand, at least half of all known occupied caves are protected from land development and managed consistently with conserving the species, many of which were preserved pursuant to local government-sponsored habitat conservation plans approved by USFWS. The plan implemented by the City of Austin and Travis County requires those entities to preserve 19 caves—86 percent of the species' total known localities within Travis County at the time USFWS approved that plan. At least 16 of the 19 caves have been preserved to date. Just north, in Williamson County, the County and the Williamson County Conservation Foundation committed to preserving and managing approximately 700 acres of land benefiting the Bone Cave Harvestman. That plan was based on the USFWS's recovery plan in effect as of the date that plan was approved. Under the Williamson County plan, approximately 943 acres of land have been preserved and new localities of the species have been documented.

The continued listing of the Bone Cave Harvestman, which was presumed endangered at the time of listing because of the small number of known occurrences of the species, is evidence of cognitive bias at USFWS. The agency continues to invoke the same narratives to justify its listing now that were communicated at the time of the initial listing in 1988. And the agency has put on blinders to the substantial body of evidence that countermands that narrative. This conduct is not decision-making on the basis of the best available scientific information; it is based on the precautionary principle. As such, it is unlawful.

Conclusion

NMFS and USFWS face substantial challenges as they implement the MMPA and ESA, including imperfect information regarding the status, threats to, and conservation needs of protected species and politicization of agency decisions from both sides of the aisle. But that is not grounds for giving the agencies a pass when their actions have real world consequences for both wildlife and society. Instead, given the stakes, NMFS and USFWS should be held to account to make decisions on the basis of the best available scientific information without bias and mindful of the impacts of their decisions on every-day Americans and America's wildlife.

QUESTIONS SUBMITTED FOR THE RECORD TO PAUL WEILAND, PARTNER, NOSSAMAN LLC

Questions Submitted by Representative Wittman

Question 1. Too often, insufficient information is used to create MMPA-related rules even when almost zero takes or incidents occur. It seems that many of these rules have been promulgated "by analogy." The differences in large marine mammal populations in offshore and inshore waters are significant. We don't see whales and manatees and sea otters up in the Chesapeake Bay. The agencies implementing and enforcing MMPA should recognize these differences. Why, in your opinion, why would we place additional MMPA enforcement onto industries that don't even impact marine mammals in the first place? And how can we ensure accurate data collection of impacts on mammal populations to prevent disruptions to inland fisheries?"

Answer. In general, the Marine Mammal Protection Act (MMPA) requires National Marine Fisheries Service (NMFS) to use the best scientific information available. Congress does not define the term "best scientific information available" in the MMPA, but it is logically defined to mean the best scientific information available at the time of the agency action or determination, including credible and reliable data, quantitative analyses, and conceptual and numerical models, taking into account the reliability and the known or potential sources of error, and carried out using prevailing principles, methods, tools, and professional standards of practice. The best scientific information should be impartially gathered and objectively evaluated in accordance with its reliability and scientific rigor; it should not be distorted by applying policy judgments such as erring on the side of the species. When NMFS personnel depart from value-neutral assessment of the best scientific information by putting a thumb on the scale, the agency is more likely to regulate (or over-regulate) activities that do not harm marine mammals disrupting otherwise lawful and productive conduct.

NMFS relies on models to inform its assessment of the status of marine mammals and their habitats and the effects of human activities on them. Quantitative models, developed by NMFS staff and informed by a combination of available data and assumptions, allow NMFS to draw inferences regarding the size and distribution of marine mammal populations and the factors that affect the population growth rate of those populations including those factors that contribute to deaths of marine mammals. These models are a simplification of reality as the National Academies explained in the 2007 volume *Models in Environmental Regulatory Decision Making*, and model outputs (or predictions) often are characterized by substantial uncertainty.

Because available data regarding marine mammals is limited, NMFS must make assumptions when building and running models to draw inferences, such as inferences regarding the relative contribution of various factors to marine mammal deaths. For example, with respect to the North Atlantic Right Whale, NMFS has gathered data regarding entanglements in fishing gear. Over the period 2010–2019, NMFS identified 112 instances of observed Right Whale entanglements in fishing gear. In roughly three quarters of those cases, NMFS could not determine whether the country of origin of the gear was Canada or the U.S. But to run its quantitative model to develop projections of the relative contribution of the U.S. lobster fishery and other U.S. and Canadian fisheries to Right Whale entanglements and deaths, NMFS built an assumption into the model that entanglements of unknown origin should be split 50–50 between the two countries.

In arriving at this 50–50 split, NMFS discarded available scientific data it had on entanglements of known origin. In roughly one quarter of the cases of observed entanglements, NMFS was able to determine the country of origin. And in those cases, 69 percent were attributable to Canada and 31 percent were attributable to the U.S. The agency could have apportioned unassigned observed entanglements based on those observed data, yet the agency chose to use a 50–50 split. Assumptions in agency models such as this have led agencies to misestimate the status, trend, and/or distribution of species as well as the risk posed to species due to human activities. The best means to reduce the potential for errors that could harm wildlife and society are to design and implement data collection regimes that are focused on highest priority management needs and to continue to develop and implement best practices (ser forth in the above definition of the best scientific information available) in a manner intended to minimize uncertainties and also to daylight any assumptions that stem from such uncertainties. As important, when the agency shifts from value-neutral development and articulation of the best scientific information available to value-laden policy judgments regarding areas of uncertainty, it should engage stakeholders in the decision-making process and be transparent about the policy judgments applied.

Ms. HAGEMAN. Thank you, Mr. Weiland. I think that that is referred to as opportunity costs.

I now recognize Mr. Moore for 5 minutes.

STATEMENT OF PARKER MOORE, PRINCIPAL, BEVERIDGE AND DIAMOND PC, WASHINGTON, D.C.

Mr. MOORE. Chair Hageman, Ranking Member Hoyle, and esteemed members of the Subcommittee, thank you for the opportunity to speak today. My name is Parker Moore. I am an environmental attorney with Beveridge and Diamond, and have over 20 years of experience advising on the Endangered Species Act and the Marine Mammal Protection Act. I am here today to highlight two critical problems with the implementation of these important laws: regulatory overreach and conflicting permitting processes.

I want to start with regulatory overreach. A striking example of this overreach involves the Vessel Speed Rule which NOAA Fisheries, or NMFS, purportedly issued under section 112(a) of the Marine Mammal Protection Act and Section 11(f) of the Endangered Species Act.

As Mr. Weiland just explained, initially issued in 2008, these regulations impose a 10-knot speed limit on boats 65 feet or longer across vast areas of the Atlantic Ocean. NMFS says that it issued the Vessel Speed Rule to reduce the potential for those boats to collide with an endangered North Atlantic right whale. In 2022, NMFS proposed expanding these rules to include boats as small as 35 feet and to extend the 10-knot speed limit to a much larger area of the ocean for up to 7 months every year. This proposal would have impacted more than 63,000 additional boats annually.

The problem with this is twofold. First is a lack of authority. Neither the Endangered Species Act nor the Marine Mammal Protection Act grants NMFS the power to develop or implement prophylactic regulations aimed at reducing the possibility that an already unlikely event like a whale collision might occur. In fact, over the past two decades NMFS has explicitly requested, and Congress has considered, several bills that specifically would grant NMFS this power. None of those bills passed.

The second problem is the lack of a factual or scientific basis. The proposed expansion of the Vessel Speed Rule to cover boats 35 to 65 feet was a solution in search of a problem. NMFS's own data showed that there is a far greater chance of a boat being struck by lightning than there is of a boat striking a right whale. For example, in the waters off South Carolina there has been only one documented boat collision with a right whale, ever. That happened 15 years ago. It involved a boat longer than 65 feet, and NMFS doesn't even know how fast that boat was traveling at the time. The statistics are similar for the great majority of the Atlantic coast.

Fortunately, faced with bipartisan opposition and over 90,000 public comments, NMFS quietly withdrew the proposal last month. However, the original 2008 rule remains in place for boats longer than 65 feet, prohibiting them from traveling any faster than the speed of an average golf cart, and there is every indication that NMFS will attempt to revive the expanded speed limit in the future.

The second major implementation issue lies in the incompatible requirements between the ESA and the MMPA for authorizing incidental take. While both laws prohibit the unauthorized take of protected species, each offers pathways for permitting incidental species impacts. However, when a species is protected under both laws, these processes can become unworkable.

Under the ESA, incidental take can be authorized with an incidental take statement for federally connected activities or with an incidental take permit for non-Federal activities. But if the species in question is a threatened or endangered marine mammal, those ESA authorizations are not available until the activity first receives a separate incidental take permit under the Marine Mammal Protection Act. That creates a huge problem because, at best, an MMPA permit often takes years to obtain, but in many cases it takes forever. And that is because an MMPA permit is not available at all.

This problem frequently arises with the Florida manatee. The manatee is an ESA-listed threatened species. It also is a marine mammal. So before the Fish and Wildlife Service can issue an incidental take permit or an incidental take statement to an activity

that may affect a manatee, that activity must first receive an MMPA permit. But that can't happen. The Service has never taken the necessary regulatory steps that would allow it to issue an incidental take permit for the manatee under the MMPA. As a result, projects like marinas, boat ramps, and docks throughout the Southeast that may affect even a single manatee can never receive the necessary Federal permits they require, and that cannot be what Congress intended.

In conclusion, while these implementation problems are significant, they could easily be fixed with two straightforward statutory amendments, which I have provided in my written testimony. These targeted reforms will realign Federal agency implementation with congressional intent, reduce regulatory burden, and maintain strong protections for at-risk species.

Thank you for considering my testimony. I am happy to answer any questions.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF W. PARKER MOORE, ENVIRONMENTAL ATTORNEY

Thank you for inviting me to testify at this hearing. My name is W. Parker Moore, and I am a principal at the law firm of Beveridge & Diamond, P.C. Although I represent a variety of clients on protected species issues under both the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA), I am appearing here today solely in my personal capacity. The views I express today are my own. I am not representing my law firm, any client of my law firm, or any other party.

I have extensive experience with both the ESA and the MMPA. I have been advising clients on legal issues that arise under both statutes for over 20 years. In addition, before becoming a lawyer, I served as a wetlands and species ecologist for an environmental consulting firm, during which time I worked on a variety of at-risk species issues. Over the course of my career, I have had a front row seat to the continuously evolving implementation of the federal species protection laws and been on the battle lines as each successive administration works to advance its priorities under them. But for all the differences among the administrations, one thing has remained very much the same over the years: regulatory agency overreach and an incompatible permitting system. Today, I would like to share with you just two of the many recent examples of these problems under the ESA and MMPA and then offer simple ideas for fixing them.

I. Agency Overreach Under the ESA and MMPA: The Vessel Speed Rules

The ESA and the MMPA each grant the U.S. Fish and Wildlife Service (USFWS) (through the Department of the Interior) and NOAA Fisheries or "NMFS" (through the Department of Commerce) significant authority to promulgate regulations needed to administer the statutes. Unfortunately, at times, the agencies have stretched that authority beyond reason.

Section 112(a) of the MMPA provides that "[t]he Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subchapter." 16 U.S.C. § 1382(a). While the phrase "necessary and appropriate" generally is interpreted broadly, it is not limitless. Among other things, Congress made clear that the agency rulemaking authority is confined to issuing regulations that are necessary to administer Subchapter II of the MMPA. Congress used Subchapter II for many important things—establishing a moratorium on taking marine mammals, imposing strict prohibitions on unauthorized take, creating an incidental take permitting program, codifying a detailed framework for regulating federally-jurisdictional commercial fishing operations, and incorporating specific penalty and enforcement provisions—each of which is set forth in great detail. *Id.* §§ 1371–1389.

Section 11(f) of the ESA is even narrower. That provision states in pertinent part that "[t]he Secretary [is] authorized to promulgate such regulations as may be appropriate to enforce this chapter . . . ." 16 U.S.C. § 1540(f). Thus, the plain language of this provision explicitly limits the agency rulemaking authority to regulations that will further statutory enforcement.

Notwithstanding the limitations on agency regulatory authority that Congress articulated in Section 112(a) of the MMPA and in Section 11(f) of the ESA, the agencies have acted to broaden their authority over time through the rulemaking process. A now-infamous example of this is NMFS's imposition of a 10-knot speed limit on tens of thousands of boats traveling across huge swaths of the Atlantic Ocean—ostensibly to reduce the possibility that those boats might collide with the endangered North Atlantic Right Whale (NARW).

NMFS first promulgated this regulation in 2008, calling it the *Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales*. 73 Fed. Reg. 60173 (Oct. 10, 2008) ("Vessel Speed Rule I"). Under Vessel Speed Rule I, NMSF designated ten "Seasonal Management Areas" (SMAs) between Massachusetts and Florida and imposed a 10-knot speed limit on virtually all private boats 65' or longer traveling within one of those SMAs when a NARW might be passing through the area.

The SMAs are not small, and the time period when the 10-knot speed limit applies within them is not short. Nor is the number of boats affected trivial. Together, the SMAs span tens of thousands of square miles of ocean off of the Atlantic Coast. The speed limit applies for 5 months or more in much of that area. And there are thousands of boats affected by this each year. In contrast, NMFS estimated that there were only 313 NARW in the western Atlantic Ocean when it issued this rule, making it exceedingly unlikely any boat subject to the rule ever would encounter a right whale. Nevertheless, NMFS determined that "a rule to limit vessel speeds in times and areas where right whales are most likely to occur is necessary." 73 Fed. Reg. at 60174.

During public review on the proposal to issue Vessel Speed Rule I, a commenter questioned NMSF's authority to promulgate and enforce a regulatory speed limit intended to reduce the mere possibility of impacts to protected whales. *Id*. at 60182. NMFS assured the commenter that Congress empowered the agency to promulgate the prophylactic regulation under its general rulemaking authorities in Section 112(a) of the MMPA and Section 11(f) of the ESA. *Id*. NMSF's assurances notwithstanding, there is ample evidence that neither NMFS nor Congress believed the agency's regulatory authority extended so far.

On numerous occasions since 2000, Congress has considered statutory amendments specifically to empower NMFS with the prophylactic rulemaking authority that the agency maintained it already had when it issued Vessel Speed Rule I in 2008. For example, in 2003, the Bush Administration proposed an MMPA reauthorization bill that, among other things, would have authorized NMFS to issue regulations, like speed restrictions, aimed at reducing the potential for vessel collisions with whales. During the corresponding Senate Hearing on the so-called *Future of the Marine Mammal Protection Act*, agency witnesses testified specifically on this issue. S. Hrg. 108–981 (July 16, 2003). Those witnesses plainly recognized that NMFS had no such authority and, therefore, requested a statutory amendment to provide it:

- Dr. Rebecca Lent, Deputy Assistant Administrator for Fisheries at NMFS, testified that "[t]he bill provides authorization to use authorities to reduce the occurrence of ship strikes on whales, a very big concern for right whales." Dr. Lent further testified that "[t]he Administration bill would authorize the Secretary to use the various authorities available under the MMPA to reduce the occurrence of ship strikes of whales and to encourage the development of methods to avoid ship strikes." *Id*.
- David Cottingham, Executive Director of the Marine Mammal Commission, a body established under the MMPA to advise NMFS on implementing the statute, testified that "[t]he Administration bill highlights the ship strike issue as one requiring priority attention. One of the difficulties impeding progress in addressing this source of mortality is a lack of agreement concerning the existing legal authorities that can be brought to bear on the issue." *Id*.

Notwithstanding these requests to amend the MMPA to authorize NMFS to regulate boat speed in the name of whale protection, Congress did not pass the bill.

In the years following NMFS's failed attempt to expand its MMPA rulemaking authority, several bills were introduced in both the U.S. Senate and the U.S. House of Representatives to grant the agency regulatory authority to restrict boat speeds. *See, e.g.*, S. 2657 (2008) (proposed amendment to require NMFS to issue a rule imposing boat speed limits and to codify that rule under the MMPA); H.R. 5536 (2008) (same); H.R. 5957 (2021) (proposed amendment to authorize NMFS to develop and implement boat speed limits remarkably similar to the Vessel Speed Rule). But each time the measure failed. There is no plausible reason that an agency would request

a statutory amendment to provide it with authority it already has. Nor is there a plausible reason that Congress would repeatedly consider amending a statute to grant an agency power that already exists. The only rational explanation is that NMFS does not have the rulemaking authority it claims.

Despite lacking the statutory authority to develop and implement prophylactic regulations like Vessel Speed Rule I, NMFS faced enormous pressure from environmental groups to expand the rule even further. In 2012 and again in 2020, a coalition of environmental groups petitioned NMFS to broaden the scope of the speed limit regulations dramatically to cover an even larger area of the Atlantic Ocean and tens of thousands of more boats. When NMFS did not immediately grant those petitions, the coalition sued, alleging the agency unreasonably delayed acting. *Whale and Dolphin Conservation v. NMFS*, No. 21–00112 (D.D.C. Jan. 13, 2021). To its credit, NMFS initially fought that lawsuit. But as litigation continued into the following year, NMFS eventually gave in to the environmental groups' demands, and on August 1, 2022, it issued the proposed *Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule*, 87 Fed. Reg. 46921 (Aug. 1, 2022) ("Vessel Speed Rule II").

NMFS's proposed Vessel Speed Rule II was breathtaking in scope. Under the proposal, NMFS sought to establish five enormous Seasonal Speed Zones (SSZs) that would blanket the Atlantic Ocean from the East Coast to as far as 90 miles offshore, a total area spanning tens of thousands of square miles, and expand the applicability of its 10-knot speed limit in those areas to cover all boats 35' and longer for up to seven months of each year. Yet again, NMFS claimed Section 112(a) of the MMPA and Section 11(f) of the ESA gave it the power to promulgate such a rule. 87 Fed. Reg. at 46934. But, again, they do not.

What is more, NMFS's sweeping proposal was as unnecessary as it was unauthorized. There simply was no scientific or factual basis for the agency to expand the 10-knot speed limit to restrict the travel of an additional 63,000 boats each year across virtually the entire eastern seaboard.

The waters off the coast of South Carolina provide a perfect example of this. Under proposed Vessel Speed Rule II, NMFS sought to establish a massive new restricted speed area (the "South Carolina SSZ") encompassing nearly 6,600 square miles that would apply to all boats 35' and longer traveling within it from November 1 to April 15 each year. But NMFS was unable to identify a factual basis for instituting such a restriction off of the South Carolina coast. Indeed, the agency's proposal identified just a single recorded NARW collision as having ever occurred anywhere in the waters off South Carolina. That isolated incident occurred nearly 15 years ago, the vessel involved was more than 65 feet long, and the vessel's speed is unknown. In other words, NMFS claimed it was necessary to create the South Carolina SSZ and impose a draconian speed limit on all 35'–65' boats within it to protect NARWs, but it could not identify even a single instance of one of those boats having ever collided with a right whale while traveling *at any speed* in the waters off the South Carolina coast. The proposal therefore was guarding against something that had never happened before in recorded history.

Nor was there any reason to think it could happen in the future. NMFS's own modeling accompanying the proposed rule predicted a microscopic mortality risk of 0.00000 to 0.00003 from all boats (including those >65') across the overwhelming majority of the South Carolina SSZ. See NOAA Technical Memorandum NMFS-SEFSC-757, Assessing the risk of vessel strike mortality in North Atlantic right whales along the U.S. East Coast, at 30–35 (May 2022).

That disconnect between reality and the proposed rule was not limited to only South Carolina's waters, however. Based on NMFS's own data, since 2017, there have been at most six NARW collisions anywhere between Ossabaw Island, Georgia and Elberon, New Jersey that *even potentially* involved a 35'–65' boat. During that same period, there were an estimated 5.1 million *recreational fishing* trips by boats of that size in those same waters. Given that those trips represented just a fraction of the total trips by all boats of that size through those areas, there is at best a one-in-one million chance of those boats colliding with a right whale for the majority of the U.S. coast. In other words, in any given year, a boater is significantly more likely to be struck by lightning than to strike a right whale.

That NMSF relied on authority it does not have to solve a problem that does not exist is bad enough. But it did so while ignoring the consequences of its actions. The agency claimed that the proposed rule would cause roughly $1 million in impacts to recreational boating interests nationwide. NMFS, 2022 Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis ("RIR"), at 34. To calculate that financial impact, NMFS simply estimated the total number of delay hours boaters would experience under the rule from having to travel at the speed of a typical golfcart and then multiplied those hours by the national average hourly wage rate

of $28.20. RIR, Appendix A, at 11. That was it. Inexplicably, the agency never investigated or accounted for the real-world implications of the rule. Had it done so, it would have understood that the rule would have made recreational offshore fishing impossible along the majority of the eastern seaboard, decimated the recreational boating, fishing, and tourism industries across much of the Atlantic Coast, and caused billions of dollars in losses.

For these and other reasons, there was immediate and vocal opposition to the proposed rule. The opposition was not confined to any location, economic sector, or political persuasion. In addition to boating and fishing interests, the proposal was fought by virtually every other industry and chamber of commerce with any connection to marine activities, along with mayors, governors, and state and federal lawmakers. The objections were numerous, well-reasoned, and sustained. They came from across the country and from both sides of the aisle. All told, the agency received over 90,000 comments on the proposal. Eventually, NMFS could no longer ignore the writing on the wall. Faced with a near certain Congressional Review Act challenge, last month NMFS quietly published notice that it was withdrawing the proposal, explaining that it did not have enough time to finalize the rule before the Trump administration took office. 90 Fed. Reg. 4711 (Jan. 16, 2025).

While the proposed Vessel Speed Rule II is gone for now, Vessel Speed Rule I remains in place. Over the past year, NMFS has relied on that rule to fine the operators of 65'+ boats $15,000 to $30,000 each time they allegedly exceeded the 10-knot speed limit in one of the massive restriction zones regardless of whether a right whale was present anywhere in that zone. Moreover, there is every indication that NMFS intends to make another run at promulgating Vessel Speed Rule II as soon as a more favorable Presidential administration is in office. And there is no reason to believe that NMFS will not try to similarly regulate other private activities across the nation with unjustified rules aimed not at prohibiting and preventing actual statutory violations, but at avoiding a hypothetical violation that might occur only if many highly unlikely circumstances were to arise simultaneously.

To put it bluntly, precautionary rulemaking like the Vessel Speed Rules is regulation run amok. Congress never intended it, and the ESA and MMPA do not authorize it. But NMFS's actions demonstrate that this needs to be made explicit in both statutes. It is imperative to correct course so that the agencies entrusted with conserving protected species can refocus their attention on accomplishing that cimportant goal.

II. Incompatible Permitting under the ESA and MMPA

The ESA and the MMPA are designed to protect and conserve at-risk species and marine mammals. Congress enacted the MMPA in 1972 because "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1). In enacting the MMPA, Congress recognized that many marine mammal species were depleted or threatened by human activity and that "such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part." 16 U.S.C. § 1361(2). Congress enacted the ESA the following year to "[p]rovide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b).

But Congress also recognized that it would be infeasible to accomplish these important goals under the ESA and the MMPA by simply prohibiting all impacts to those species at all times and from every activity. As a result, while both statutes strictly prohibit unauthorized "take" of the species they protect, they also provide mechanisms to apply to USFWS and NMFS (together, "the Services") to authorize species impacts that are incidental to otherwise lawful activities. By including these permitting mechanisms in the statutes, Congress intended to create an effective conservation framework without unreasonably impeding the innumerable private, commercial, and governmental needs that arise each day across this country. Unfortunately, it has become increasingly clear that the permitting mechanisms under the two statutes are incompatible when the species at issue is a marine mammal that also is listed as threatened or endangered under the ESA. At the root of this problem are two statutory provisions: Section 7(b)(4)(C) of the ESA (16 U.S.C. § 1536(b)(4)(C)) and Section 101(a)(5) of the MMPA (16 U.S.C. § 1271(a)(5)).

By way of background, Section 9 of the ESA, together with the Services' ESA regulations, prohibits the unauthorized "take" of threatened and endangered species. 16 U.S.C. § 1538(a)(1)(B). ESA compliance for activities that will take a listed species can be achieved in two ways. For activities with a federal nexus (i.e., activities requiring a federal permit, taking place on federal lands, or relying on federal

funds), compliance is achieved through Section 7 of the ESA (16 U.S.C. § 1536(a)(2)). Under Section 7, before the activity may be approved, the federal authorizing agency must consult with one or both of the Services to ensure that allowing the proposed activity to proceed would not "jeopardize the continued existence" of any threatened or endangered species. Upon making that "no jeopardy" determination and completing Section 7 consultation, the Services will issue an incidental take statement (ITS), which exempts the anticipated impacts to the listed species from the ESA's take prohibition. That exemption functions much like a permit by making any species take that occurs lawful.

For activities that do not have a federal nexus, ESA compliance is achieved by obtaining an incidental take permit (ITP) from the Services under Section 10 of the statute (16 U.S.C. § 1539(a)(1)(B)). An ITP authorizes take of the listed species so long as certain requirements are met, including that the permitted impacts "would not appreciably reduce the likelihood of the survival and recovery of the species in the wild." *Id*. § 1539(b)(2)(B). Although ITPs are issued under Section 10 of the ESA, the Services have taken the position that the issuance of an ITP is itself a federal action that triggers Section 7 consultation. As a result, even though Section 7 consultation explicitly is reserved only for federal activities and Section 10 permits are available only for non-federal activities that will not significantly impair a species' overall population health, the Services curiously have concluded that they must consult with themselves under Section 7 before they may issue an ITP under Section 10. Rightly or wrongly, that means that before the Services issue an ITP or an ITS authorizing or exempting take of a threatened or endangered species, they first must complete Section 7 consultation and determine that the proposed activity will not "jeopardize the continued existence" of the species.

That the ESA compliance mechanisms for every activity, whether federal or non-federal, involve Section 7 consultation is particularly consequential when the listed species at issue also is a marine mammal. This is because, pursuant to Section 7(b)(4)(C) of the statute, after completing a Section 7 consultation, the Services may not issue an ITS exempting take of a threatened or endangered marine mammal under the ESA unless the Services already have issued a separate incidental take permit for that species under Section 101(a)(5) of the MMPA. 16 U.S.C. § 1536(b)(4)(C). This is where the incompatibility arises between the take authorization provisions of the MMPA and the ESA.

The MMPA prohibits take of any marine mammal that has been designated as "depleted," except under an incidental take authorization issued under Section 101(a)(5) of the statute. The MMPA provides two options for such authorizations. First, the Services may issue an "incidental harassment authorization" for activities that will harass a marine mammal through injury or disturbance for a period of up to one year. 16 U.S.C. § 1371(a)(5)(D). Second, for activities lasting more than a year or having the potential to seriously injure or kill a marine mammal, the Services may permit the impact by issuing a "letter of authorization." *Id*. § 1371(a)(5)(A)(i). But this letter of authorization approach is available only if USFWS or NMFS already has promulgated a regulation removing that species from the MMPA's moratorium on taking marine mammals. *Id*. It is this second type of MMPA authorization that is incompatible with Section 7 of the ESA.

This statutory incompatibility results from Section 7(b)(4)(C), which, as explained above, prohibits the Services from issuing an Endangered Species Act incidental take statement for a threatened or endangered marine mammal unless the take-causing activity separately has received incidental take authorization under Section 101(a)(5) of the Marine Mammal Protection Act. That means that even though the Services have concluded that an activity will not jeopardize the species and is otherwise consistent with the requirements of the ESA—the statute Congress enacted specifically to protect, conserve, and recover imperiled species—the activity still cannot proceed without an MMPA authorization simply because the species also happens to be a marine mammal. Given the legislative intent underlying the ESA, such redundancy is unnecessary. More importantly, however, it is unworkable.

At best, requiring a proposed activity to undergo ESA Section 7 consultation and separately receive an MMPA incidental take authorization adds significant unnecessary cost and time. Completing formal consultation under Section 7 of the ESA typically takes more than six months and can cost the proponent of the activity hundreds of thousands of dollars. Requiring separate MMPA authorization makes the situation even worse because completing that process generally requires an additional nine to 18 months or longer. But this "best case" scenario is achievable only if USFWS or NMFS already has promulgated a regulation under the MMPA removing that species from the statute's moratorium on marine mammal take.

At the other end of the spectrum is the worst case scenario under which no MMPA authorization is available at all. That situation arises anytime the species

at issue is an ESA-listed marine mammal for which USFWS or NMFS has not promulgated a regulation exempting the species from the MMPA's moratorium on species take. Absent such a regulation, Section 101(a)(5) of the MMPA prohibits the Services from issuing an incidental take authorization for the activity. That, in turn, means that the activity cannot satisfy Section 7(b)(4)(C) of the ESA and the Services, therefore, cannot issue an ESA incidental take statement for that activity. And without an incidental take statement covering impacts from the activity at issue, the federal action agency that initiated Section 7 consultation cannot comply with the Endangered Species Act and, therefore, must reject the application to undertake to proposed activity.

This drastic outcome unfortunately is not uncommon. As just one example, this problem frequently arises in the Southeast U.S. within the range of the West Indian manatee. The manatee is a beloved marine mammal that USFWS has listed as a threatened species under the ESA but has not promulgated a regulation removing the species from the MMPA's moratorium on marine mammal take. As a result, any proposed activity that could incidentally take even a single manatee cannot be approved under the MMPA and, therefore, cannot receive an incidental take statement under the ESA. This has resulted in scores of proposed activities and projects throughout the Southeast—including marinas, boat ramps, docks, and industrial and commercial developments—being denied federal permits and approvals simply because the threatened species that would be impacted happens to be a manatee, rather than some other threatened or endangered species.

It is hard to imagine that this is what Congress intended with Section 7(b)(4)(C) of the ESA. When Congress required activities undergoing Section 7 consultation to secure an MMPA authorization before receiving an ESA incidental take statement, it could not have anticipated that MMPA authorizations would never be available for particular species of marine mammals. But that is exactly what has happened, and it has resulted in an arbitrary application of the law. As things currently stand, the Services freely authorize incidental take of threatened and endangered non-marine mammal species from an activity, but cannot authorize incidental take of certain threatened and endangered marine mammal species that would face identical impacts from that activity. While all threatened and endangered species should receive the full protections that Congress intended for them under the ESA, continued differential treatment of listed marine mammal species serves little conservation or recovery purpose. Congress, therefore, should amend the MMPA and the ESA to harmonize the two statutes.

* * * * *

In conclusion, while the ESA and the MMPA serve important national goals, the federal implementing agencies are interpreting and implementing both statutes in ways that Congress never intended. The result has been sweeping regulatory restrictions on private activities across broad swaths of the country's lands and oceans and arbitrary denials of federal permits. Because these problems arise from the provisions of the ESA and MMPA, only a legislative change can fix them. This could be accomplished with two straightforward steps:

1. Amend Section 112(a) of the MMPA (16 U.S.C. § 1382(a)) and Section 11(f) of the ESA (16 U.S.C. 1540(f)) to clarify that the authority to promulgate regulations that are "necessary" and/or "appropriate" under each statute does not include authority to promulgate prophylactic regulations designed to reduce the mere potential for private activities to impact species; and
2. Amend Section 101(a) of the MMPA (16 U.S.C. § 1371(a)) to include an exception to the moratorium on taking a marine mammal to the extent that taking is covered by an incidental take statement to a biological opinion issued under Section 7(b)(4) of the ESA (16 U.S.C. § 1536(b)(4)), and make a conforming amendment to the ESA by striking Section 7(b)(4)(C) (16 U.S.C. § 1536(b)(4)(C)).

Making these simple changes would realign federal agency implementation of the ESA and MMPA with the legislative frameworks that Congress designed, foster better governmental decision-making, and promote continued conservation and recovery of at-risk species.

Thank you for considering this testimony.

Ms. HAGEMAN. Thank you. I want to thank all of the witnesses for your incredibly helpful testimony, and I am now going to

recognize Members for 5 minutes each for their questions, and I am going to begin with me.

Before that I just want to make one point, which is that offshore wind farms, or the impact of offshore wind farms on the North Atlantic right whale has been well documented, yet politics prevents the Fish and Wildlife Service from acknowledging that, and instead they are misdirecting assets and resources towards going after things such as our fishing industry. And I think that that epitomizes one of the primary problems with the ESA and the MMPA.

Mr. Vecchione, in your testimony you state that the shifting legal landscape of the last 2 years culminating in *Loper Bright, Relentless* now means that Congress can reassert itself. *Loper Bright* is thus an administrative decision, and it is not a policy decision. What does that mean for Congress going forward?

Mr. VECCHIONE. It means that you can't rely on a friend in the White House to fix a lot of problems by just changing the regulation. If you see a problem, Congress now has to address it. They can't, I say that one of the lawyers arguing this case told the court that sometimes Congress, it is divided in two, if they think the guy in the White House is of their own party, they don't want to do anything because they will just get the right outcome. And then if he is in the other party, they will fight whatever anyone is doing.

Now Congress, if it sees a problem, is going to have to address it because there is a very good chance, particularly when new things come along, that the courts won't allow the agencies to say this new thing is just like the old thing, and to regulate it. So that is, in a nutshell, what I think is going on.

Ms. HAGEMAN. Well, I think that, as practitioners, we need to be better at our job. I think that we, as Members of Congress, need to do more in terms of providing definitions, perhaps putting preambles on our acts, but we need to be writing legislation that is not vague and ambiguous so that we don't need to worry about the courts interpreting or reinterpreting what we intend to do.

Mr. Weiland, when the services are performing a Section 7 consultation under the ESA, is it ever appropriate for them to pretend that an existing structure such as a dam does not exist?

Mr. WEILAND. The short answer, Chair, is no, it is not. But I will say it is more complicated under the consultation provisions as they have been interpreted in the Act.

So the purpose of consultation is to analyze the effects of the proposed action on the listed species and, if there is designated critical habitat, on it is habitat. But that requires differentiation between the environmental baseline for the species and the proposed action, so you have to look at what are the impacts from the action of the species and, separately, what is the environmental baseline. And the existence of the dam, for example, should be in the baseline, and should not be considered part of the action. So, someone who is changing operations of the dam, for example, should not have to account for the presence of the dam during the consultation. That should be in the baseline.

In addition, I would say the pre-consultation operations, let's say you are getting a FERC relicensing. The pre-consultation operation should also be in the baseline. So, you have the dam, you are oper-

ating a certain way, and what you are consulting on is your change to the operations, and that is the extent of the effects of the action as I see it.

But I will say in the case law and agency interpretation, these things are not as clear, and there are divergent views about this issue. And as a consequence of that, there are many baseline activities that get captured up in the effects of the action. And the consequence of that is there are more jeopardy determinations that there need to be——

Ms. HAGEMAN. That is right.

Mr. WEILAND [continuing]. And there are more requirements for minimization and mitigation based upon these baseline effects, rather than the effects of the action.

Ms. HAGEMAN. Well, in fact, the past administration, they were notorious for trying to exclude these structures like dams in the baseline, and therefore they were restricting more projects, and limiting more projects and finding more jeopardy. And I think that that is a problem, and I have experienced it for years working on the Platte River program as an example, where they literally ignored the dams that existed as part of the baseline, and thereby creating problems of trying to put together a program for the endangered and threatened species.

Again, Mr. Weiland, another question. The MMPA authorization standards require the government to find that an action will have a "negligible impact and effect on small numbers of a species or stock." What does the small number standard really achieve?

Mr. WEILAND. There is very little in the legislative history about that that I am aware of. So, I would say, because of the negligible impact standard, the addition of small numbers to that seems arguably redundant.

And I would go back to comments that have already been made by my colleagues and by members of this Committee. When all of these Acts were passed in the 1970s, it was contemplated there would be regular reauthorization. Same with the Clean Air Act and Clean Water Act, and same with these others. And during that period and into the 1980s there was a number of these acts, and there were significant changes. For example, the Endangered Species Act in 1982. And that has essentially halted. And as a consequence, we are left with acts that are really being interpreted by agency and by judges, rather than Congress going in and being able to revisit and clean those up.

And I think it is unfair to fault Congress in the 1970s. It was doing the best it could. But if you were to go to a doctor and they were to say, "I am going to give you the same advice I would have given you in the 1970s," you would go to another doctor, right? So, if Congress can update the Act, we will all be better off for it.

Ms. HAGEMAN. I think that that is excellent advice. And with that, my 5 minutes are expired and so I am going to go to Representative Magaziner for his 5 minutes of questioning. Thank you.

Mr. MAGAZINER. Thank you, Chair. And before I begin my prepared remarks I just want to respond to something that the Chair said in her statement.

Unlike in her State, we have offshore wind in my State, and we can tell you from experience that there has not been a single

documented right whale death that can be tied to offshore wind. There have been whale deaths tied to fishing gear entanglements, to vessel strikes. Not a single one tied to offshore wind.

So, we can have a conversation about what is appropriate for a Vessel Speed Rule, where it should be imposed, and what size vessels should be included. That is a legitimate conversation to have. But it has to be a fact-based conversation.

And I would just remind everyone there is far more seismic activity that happens with oil and gas drilling in the Gulf that impacts marine life than happens with offshore wind development. So no, offshore wind has not been linked to right whale deaths, does not cause cancer, et cetera, et cetera.

But listen, I am here today to talk about another issue that I haven't heard any of my Republican colleagues raise so far. We know that Endangered Species Act consultations can delay projects, but I haven't heard anyone talk about how the chaotic staffing cuts made by Elon Musk and his DOGE interns are making the problem worse as we speak.

Last week, more than 400 staff members at the Fish and Wildlife Service were fired by the children that Elon Musk has put in charge of the Federal Government. And it has been reported that they are planning on firing 1,000 more at NOAA as early as this week. These are the agencies that list and delist endangered and threatened species, that draft recovery plans, and issue permits.

And who is making these firing decisions? Are they experts in fish and wildlife? No. Do they know anything about the permitting process? No. It is Elon Musk and unelected interns sitting at desks in Washington, D.C., unelected tech bros, none of whom know a thing about fish or wildlife or permitting. So let me explain to them what these firings at Fish and Wildlife and NOAA mean.

First, they create a backlog of endangered species list petitions to list and delist species. Species at risk of going extinct take longer to get protected, and species that are no longer at risk take longer to get delisted when you do not have the staffing to process these petitions.

Second, firing staff at these agencies reduces their ability to issue permits, permits to allow important projects to proceed, including construction, infrastructure, forestry, agricultural projects, water resource projects, and energy development. So we have talked a lot in this Committee about permitting reform, and that is an important conversation to have. But be clear. You can reform all you want, but no one gets any permits to do anything if there is no staff available to process and approve those permits.

Third, firing scientists at the Fish and Wildlife Service and the National Marine and Fisheries Service hurts the animals on this planet that the Endangered Species Act was designed to protect. When experts are allowed to do their jobs, recovery efforts lead to vulnerable species bouncing back. We have seen that with sea lions and gray wolves and countless other examples. But when scientists who work on endangered species protection are fired, these species can go extinct waiting for these protections to arrive.

So Mr. Rohlf, does firing staff indiscriminately at Fish and Wildlife and NOAA increase or decrease the processing backlog for petitions and permits?

Mr. ROHLF. Well, of course, the firings that we have seen really decreases the capability of the agencies to go through the legally-mandated processes in the Endangered Species Act and Marine Mammal Protection Act.

And as I said in my remarks, courts are absolutely clear that, unless Federal agencies go through those statutorily-mandated processes, courts will simply enjoin further——

Mr. MAGAZINER. Right.

Mr. ROHLF [continuing]. Federal agency actions that affect listed species and their protected habitat.

Mr. MAGAZINER. Courts will err on the side of caution, so we could actually be slowing down development. We could be slowing down permitting by indiscriminately firing staff.

And I just want to make the point again about the process here, because they are not consulting with people on the ground, they are not consulting with the agencies themselves to say, hey, which positions may be expendable and which aren't. This is literally a bunch of kids sitting behind computer screens who have no background at all in the subject matter, no background at all in permitting, just making decisions based on very low information. And it is incredibly disruptive.

So with that, I am out of time and I will yield back.

Ms. HAGEMAN. The Chair now recognizes Mr. McDowell for 5 minutes of questioning.

Mr. MCDOWELL. Thank you, Madam Chair, and thank you to the witnesses for testifying before the Committee today.

As we look at the Endangered Species Act, it is critical that we strike a balance protecting vulnerable species without imposing unnecessary regulations that harm local economies or infringe on private property rights. We must adopt a common-sense approach to streamline the permitting process and protect private property rights, ensuring that landowners are not penalized for their stewardship.

It is also important that we don't allow the Endangered Species Act to become Hotel California, where once you arrive you can never leave. At what point are the grizzly and the gray wolf populations going to be huntable again?

It is long past time to turn these decisions over to the States that know their own needs. Sportsmen and women are our country's best conservationists. Look no further than the National Wild Turkey Federation who saved the wild turkey population through their efforts. Wild turkeys are thriving because hunters came together to find a solution. Or look at the work that Delta Waterfowl is doing protecting the populations of canvasbacks or the northern pintail. If we stop burdensome over-regulation by the Federal Government, States and groups like this could better manage the populations that they have proven that they can. We should, as a Federal Government, be out of the business of conservation through feeling-based bureaucracy, and allow States to deal with the issues they know better than we do.

Mr. Weiland, in your testimony you discuss the harms caused by agencies imposing harsh regulations. How can we ensure that the implementation of the Endangered Species Act strikes a balance between protecting endangered species and minimizing the

economic burdens it places on industries such as agriculture, energy, and construction?

Mr. WEILAND. The most effective role Congress can take, of course, is to reauthorize laws, as I suggested previously, and to write clear laws.

And as issues arise, whether it is with the executive branch or in the judicial branch, there is opportunity. An example is my colleague, Mr. Rohlf, made a reference to *TVA v. Hill*, a Supreme Court case from 1978. At the time of that case, the Endangered Species Act consultation provisions didn't have, essentially, a release valve. So, the question in the case was whether to stop a dam that was nearly completed, and the court said whatever the cost, as Mr. Rohlf alluded to, the dam had to be stopped.

Now, in response to that, in 1978 Congress promptly enacted amendments to provide a release valve, the so-called God squad, or Endangered Species Committee provisions of the Act, and it was very clear that that was a response to the *TVA v. Hill* decision, and the legislative history demonstrates that fact.

So, I think when even the Supreme Court acts, there is an opportunity for this body to essentially rebalance the Act as it is being interpreted. And certainly the same goes for Federal agencies.

Mr. MCDOWELL. Thank you.

Mr. Moore, in your testimony you describe your experience working with the Endangered Species Act and the Marine Mammal Protection Act. Given the unintended consequences the ESA has had on job creation in certain industries, what changes would you propose to ensure that conservation efforts do not come at the expense of American workers and economic growth?

Mr. MOORE. Thank you for that question.

As mentioned a little bit earlier, there are two specific categories of amendments to both the Endangered Species Act and the Marine Mammal Protection Act that I recommend, and I have suggested amendments in my written testimony.

The short of it, though, is that eliminating the irreconcilable permitting hurdles between the two statutes is absolutely fundamental to allowing those two statutes to function in the way that Congress originally designed. As it currently stands, a project that may affect a threatened or endangered species can receive a permit under the ESA, while if that species also is a marine mammal it cannot receive a permit under the Marine Mammal Protection Act. And because it can't receive that MMPA permit, it can't then receive the ESA permit because the MMPA permit has to come first. So relying on the statute that is intended to protect and conserve at-risk species is sufficient to provide the necessary protections to marine mammals.

By the same token, there is a hurdle to Section 7 consultation under the Endangered Species Act, and that is the expansion of the scope of impacts that are taken into consideration, the environmental baseline, and a tendency of agencies and some Federal courts to consider a species that is already listed as endangered to be at risk of extinction. Well, that is the very definition of endangered.

So, the interpretation that a species is at risk of extinction during Section 7 consultation means that as a baseline condition the

agency cannot issue a single impact permit for that species. That needs to be removed. You look at the environmental baseline and run from there.

Mr. MCDOWELL. Thank you.

I yield back.

Ms. HAGEMAN. Thank you. And we like witnesses who make recommendations of things that we can do better legislatively, so thank you for that.

The Chair now recognizes Mr. Golden for 5 minutes of questioning.

Mr. GOLDEN. Thank you, Madam Chair. I will direct this one to the panel, although I don't intend for all of you to answer it. So maybe quickly decide amongst yourselves, but just starting with the basics because I am new here.

How does the Endangered Species Act and Marine Mammal Protection Act allow for a balancing between species protection alongside economic impacts on regulated industries and the impacted communities and people who support them and depend on them?

Mr. WEILAND. All right, I will start.

So, one thing is, in spite of the decision in *TVA v. Hill*, or even if one assumes that that decision is still good law, the Act does not, neither Act requires agencies to put blinders on to the impacts of their decisions. So, whether it is consultation under Section 7 or the incidental take permitting provisions under Section 10, in both cases the agencies can consider the effects, for example, of mitigation, alternative mitigation on regulated industries.

And with respect to fishing, for example, there may be technological fixes that are available, or closures as options, and one may be preferable to the other from a fishery perspective. And at times I think the agencies are not creative about thinking of alternative regulatory mechanisms. A good example would be the Vessel Speed Rule, where now we have pretty advanced technologies that can be employed on boats to avoid collisions or to at least drastically minimize those occurring. So, there may be alternative regulatory mechanisms that are available, and there is nothing in those Acts that precludes them. But the agencies need to be encouraged to evaluate those fully——

Mr. GOLDEN. Sure.

Mr. WEILAND [continuing]. When they are looking at——

Mr. GOLDEN. You just gave an example where they are not taking into account technology or alternatives. Can you give me an example where Federal agencies have actually found that balance between conservation mandates with a need for practical or enforceable regulations that account for economic reality?

Mr. WEILAND. I think in the context of the MMPA, for example, and the lobster fishery, the process that the Fishery Management Council uses, where it takes input from a wide variety of interests including States and fishermen and conservationists, allows for proposals from States like Maine to do things like gear marking as one tool that can be used in order to assess the impacts of State-specific fisheries or fisheries with different kinds of gear, and to tailor mitigation in the future as a consequence of those.

And certainly, National Marine Fisheries Service has shown an opening in the past to using those types of different alternatives. I do think that there are many circumstances where they have done so.

Mr. GOLDEN. Do any of you have an example where Congress has played a role in modifying the ESA and the MMPA as it is implemented, any successful legislative adjustments to these laws that you viewed as positive?

Mr. VECCHIONE. I have it in my testimony, and so does Mr. Weiland, which is after the *TVA*. I went to the Little Tennessee River when I was a boy to canoe on it before it got dammed over, so I remember this very well. And it was stopped by the Supreme Court. And a Democratic Congress and a Democratic President amended it to make it more scientific, aspects had to be taken over. And the D.C. Circuit just recognized that recently in a case that is in my testimony.

So what happened from the Supreme Court to the amendment in 1978 that is in my testimony from that case will have a good example of that.

Mr. ROHLF. Well, I would love to pick up on that because, indeed, Congress did amend the statute after *TVA v. Hill* in 1978. It added the amendments allowing for exemptions to Section 7 of the Endangered Species Act. In fact, *TVA* is a great example. That big, important dam actually went through the so-called God squad or extinction committee process, where the Endangered Species Committee did indeed consider whether to exempt that dam. And it found that just completing the 5 percent of that dam that was remaining was not economical, produced zero economic benefit, with just 5 percent of the cost of the entire dam. So, the Endangered Species Committee unanimously did not grant that exemption.

So it is a good illustration of there are very few absolute conflicts between protecting endangered species and going forward with pork barrel projects like that.

Mr. MOORE. It is also a good example of how the Endangered Species Act doesn't actually function that well when it comes to conserving at-risk species. And the reason it is a good example is because the snail darter, the species that was at issue in *TVA v. Hill*, it turned out it wasn't endangered in the first place. The Fish and Wildlife Service listed the species under the understanding that the species occurred in only a very localized issue within the river. After further investigation and further studies, it turns out it was far more prevalent and existed in many more locations across the Southeast.

Mr. ROHLF. And it was still listed as threatened.

Ms. HAGEMAN. The Chair now recognizes Mr. Wittman for 5 minutes of questioning.

Dr. WITTMAN. Thank you, Madam Chair. I would like to thank our witnesses for joining us today. I want to look at where we are today and what the new administration should do versus what the previous administration did in relation to the Marine Mammal Protection Act, and looking at how you look at the burden that these new regulations place on other uses there, and as we talked about trying to create that balance.

Mr. Weiland, you talked about the element of assuring that there is a precautionary principle that has taken place, and what that is versus the scientific approach. As I look at precautionary approach, I see that wearing seat belts can have an impact on the 40,000 deaths we have each year in auto accidents. I also see, too, that constructing levees are a precautionary approach against flooding. All those things make sense to me as far as precautionary approach.

Creating a regulation, though, based on a one in a million chance that a right whale gets struck by a vessel that is less than 35 feet doesn't appear to me to be logical, and is in big, big imbalance with the things that we need to be doing to have thoughtful regulations. Last year the Biden administration wanted to expand the Marine Mammal Protection Act to aquaculture, which is puzzling to me because, when you have aquaculture, especially in areas where you don't have these large marine mammals, it just seems illogical to me.

So, Mr. Weiland, I want to ask you, can you discuss the concept of a precautionary measure, and how we look at that in relation to the strong science that would look at how you should create policy?

And then give me your perspective on how that scientific approach should be pursued, and how these determinations are made, not this existential precautionary approach that we saw in the previous administration.

Mr. WEILAND. Thanks for the question. One of the challenges is because the precautionary approach is ingrained in agency culture at the National Marine Fisheries Service and Fish and Wildlife Service, it is integrated into the everyday workings of agency staff, and it is a policy, really, a policy approach. But it is very difficult, if not impossible, to distinguish it from science in decision-making. And I will just give one example.

So agencies use models, they call them life cycle models, quantitative models, to understand the status and trends of species and the impacts of various activities on species. When they build these models they have data that they build into them, but they also have to make assumptions because we don't have all the data we want. And it is those assumptions that frequently involve use of a precautionary approach.

An example with regard to the North Atlantic right whale is the model that was used when evaluating the right whale. And the impacts of the lobster fishery on the right whale assumed that there is no natural mortality of right whales, that all mortality is caused——

Dr. WITTMAN. Yes.

Mr. WEILAND [continuing]. By human activity. And the consequence of that is that when you are allocating responsibility, it is all getting allocated between different human activities. So, in that circumstance, that is a precautionary approach that is built into the model. That is hidden when the model output comes out, right? You get an estimate of how much vessel collisions are likely to cause harm to right whales, how much offshore wind, how much fisheries are. And in each case it is slightly inflated because there is no assumption that there is any natural mortality.

Dr. WITTMAN. Yes.

Mr. WEILAND. And there are many examples of this. And the challenge with this is that I see the precautionary approach as something that should happen at a policy level, not at a staff or science level. And it should be out in the open and not hidden.

Dr. WITTMAN. Yes.

Mr. WEILAND. So, that is really where I think we need to have change in terms of how the agencies approach precaution.

Dr. WITTMAN. Another element too we see, regulations promulgated by analogy. A great example is in the Chesapeake Bay. We don't have large marine mammals in the Chesapeake Bay, no whales in the Chesapeake Bay, no manatees, no sea otters there, you name it. And yet they wanted to put a restriction on tethered buoys for aquaculture operations. If you don't put a tethered buoy there, then you don't know where your cages are that have the oysters in there, which, by the way, are great biological filters for the Bay, have shown to greatly improve water quality, yet this practice would essentially ban that. So to me, there is this separation of science and fact and decision-making.

Mr. Weiland, give me your perspective too on how you see that disconnect there, and how those sorts of decisions can essentially put out of business an industry that is having a great, great impact both economically and environmentally.

Mr. Weiland, let me do this. In respect for the other Members that want a question, if I can get you to submit your response to that in writing for the record, and I will yield back the balance of my time.

Ms. HAGEMAN. Wonderful, thank you. The Chair now recognizes Ms. Elfreth for her 5 minutes of questioning.

Ms. ELFRETH. Thank you very much, Madam Chair, and thank you to the witnesses.

First, let me just say it warms my heart to hear you talk about availing yourselves of the judiciary branch. When you disagree with the executive branch and when you disagree with the ruling of the judiciary, you come to the legislative branch to seek a remedy. That is exactly how our founders framed out our system of government.

So I want to respond just to some assertions made by the witnesses during this hearing about the need to throw this idea back to the States. And just like clean air and clean water or polluted air or polluted water, wildlife doesn't tend to respect arbitrary political boundaries. So, when we talk about the stewardship of our most vulnerable wildlife, I am not sure that a patchwork approach from the States would be the right solution. And to the witness' point, I don't think it would provide any kind of certainty for the business community either by going about it in that manner.

I do want to point out that when the bill, the ESA, was passed and was challenged in court, SCOTUS, and actually, Chief Justice Warren Burger, who was a President Nixon appointee, said that it was the most comprehensive legislation for the preservation of endangered species ever enacted by any Nation. I am going to highlight that word, "comprehensive," because I think it is important here.

And I want to drill down on this idea about best available science being not certain in all cases. I think when we talk about much of the body of the work of this Committee, best available science is important because the inputs are going to change on a near daily basis. Inputs of weather, inputs of pollution, inputs of overdevelopment are going to have an impact on the species, endangered species and the marine mammals that we are discussing here.

So, for Mr. Rohlf, we have talked a little bit about maybe where some people feel like the two laws that we are talking about have broken down, can you talk a little bit about the success stories that we have also seen here, and how best available science actually informed the success stories brought about by these two pieces of legislation?

Mr. ROHLF. Sure. We can talk about examples all day long, and there are many examples. Salmon and steelhead in the Columbia River basin, for example, are at least beginning a road to recovery because of protections of the Endangered Species Act that have started to address problems with those species. Changed Federal dam operations, for example, to be more conducive to the needs of those species, and the rights of Indian Tribes in the Northwest to take fish at all their usual and accustomed places.

But I think something we haven't talked much about is the fact that, if you look writ large, the Endangered Species Act has been tremendously successful. We talk about a few high-profile instances. But if you look across the country, there are thousands of informal and formal consultations under the Section 7 process of the Endangered Species Act, where Federal agencies have to consult with the National Marine Fisheries Service or the Fish and Wildlife Service. In almost all of those instances, those consultations either end informally or with a biological opinion saying the action can proceed. Or, in the rare, rare cases where there is actually a jeopardy biological opinion, it has been decades that a jeopardy biological opinion has been issued without reasonable and prudent alternatives that allow the agency action to go forward, essentially as planned, that is economically and legally feasible.

So, the Endangered Species Act really doesn't stand in the way of any development. At the most, it generally imposes modest restrictions to minimize the take of endangered species and ensure that their continued existence is not jeopardized.

Ms. ELFRETH. Thank you very much for that illumination, and it is always easy to highlight the worst-case scenarios, but not always the success stories and how——

Mr. ROHLF. That is the day-to-day of the Endangered Species Act.

Ms. ELFRETH. I very much——

Mr. ROHLF. Success stories.

Ms. ELFRETH. I very much appreciate that. We have talked a lot about private industry and some challenges to growth there from these two bills, but I also want to point out, serving on the Armed Services Committee as well, that there are success stories even within the DoD of these two laws actually helping with readiness, actually helping with installation security. And in fact, if at least a number of the former Joint Chiefs of Staff across multiple

administrations have talked about, actually the greatest threat to readiness and national security is not either of these laws, but it is actually the threat of climate change. And I hope that we can begin to discuss some of those impacts in this Committee, as well.

And with that I yield my time. Thank you, Madam Chair.

Ms. HAGEMAN. Thank you. The Chair now recognizes Mr. Bentz for 5 minutes of questioning.

Mr. BENTZ. Thank you, Madam Chair, and thank you all for being here.

Professor Rohlf, the phrase you used was, "no matter what the cost," and I think that was indeed in the Supreme Court opinion from years and years ago. But I will share a couple of costs with you.

In Oregon the spotted frog estimate for recovery is $2.7 billion. That is the number from ODF&W, Oregon Department of Fish and Wildlife.

On the four lower Snake River dams there has been an effort to have them breached. I don't know if you have been part of that litigation or not. It has been going on for a very long time. But the cost of replacing the 3,000 megawatts of peaking power that those dams provide would be somewhere between $3 to $12 billion. That is to replace the generation capacity, it is not to take into account the loss of those facilities, which would be also in the billions of dollars. So, this is going to be justified with the ESA. There is no other justification for doing it, and particularly when we lose the navigation.

So the phrase, "no matter the cost," do you take the position, then, that we should be putting $2.7 billion into the recovery of the spotted frog, and that we should be spending somewhere between, I am going to say, a low of $6 billion and a high of $20 billion to take out those dams?

Mr. ROHLF. Well, Congressman, I am not sure where you get your figures, but I am quite confident that the State of Oregon could recover spotted frogs for a fraction of those billions of dollars. The Oregon Department of Fish and Wildlife hasn't spent that much money probably in its entire existence.

As far as the lower Snake River dams go, as you well know, there are studies underway investigating the replacement of the energy output of those four lower Snake River dams with renewable energy. And in fact, there are efforts underway now spearheaded by the Tribes to develop renewable energy resources which would provide the region with clean energy to replace that of the dams, allow those dams to be decommissioned, and to fulfill the United States treaty obligations to Northwest Tribes——

Mr. BENTZ. I don't think——

Mr. ROHLF [continuing]. To allow rural communities to thrive with——

Mr. BENTZ. Yes, forgive me for interrupting, Professor.

Mr. ROHLF [continuing]. With recovered fisheries.

Mr. BENTZ. But, it is irksome that you would gloss over the cost. And the money that is going to the Tribes was done so, in my opinion and based on the hearing we held up in Kennewick where 400 people showed up to this Committee, a field hearing, to oppose

exactly what you are saying. The $400 million or whatever it is that is going to the Tribes, you are kind of glossing over that part.

You are also glossing over the part that those dams provide stable power, and that solar, which they are going to be using, is intermittent. And thus you need about three times the amount until we get a battery that works off of solar.

Anyway, I do want to go back to one thing, and it is what I call legal extortion under the guise of mitigation. And what we have then is the ODF&W or somebody else coming in and saying, you know what? You don't have to comply if you mitigate. If you go buy a ranch and give it to us, then that will offset the loss of whatever, a right-of-way for a power line. This extortionary device is terrible for all kinds of reasons.

But my question to you is, how do we appropriately measure the amount of proper mitigation?

Mr. ROHLF. Under the Endangered Species Act, for example, the statute requires agencies to use the best available science in all cases. So, in the rare instances, for example, when an agency finds jeopardy to the continued existence of a listed species, which, as I indicated, is extremely rare, in those cases the agency has to prescribe reasonable and prudent alternatives——

Mr. BENTZ. I am going to have to——

Mr. ROHLF [continuing]. And those have to be economically viable.

Mr. BENTZ. I am going to have to interrupt again. Extremely rare? I don't know how many thousands of people lost their jobs in Oregon because of the spotted owl. Literally, I don't. It is literally tens of thousands of people. You say extremely rare? It doesn't have to be anything other than rare when it has that kind of impact when it does come into play. I don't know why you say that when the consequences are so incredibly negative. So please, please, please, when you try to minimize the true consequence, please call out the damage being done.

And I yield back.

Ms. HAGEMAN. Thank you, and excellent points. The Chair now recognizes Mr. Soto for 5 minutes of questioning.

Mr. SOTO. Thank you, Madam Chair. The hearing started out with real promise. I was thinking Congress is going to reassert ourselves in stopping unelected bureaucrats from stifling the will of the people. I was like, OK, we are going to talk about the DOGE disaster today. But actually, we are talking about well-meaning Federal experts trying to stop pollution, protect our environment, and protect endangered species while an unelected billionaire takes a chainsaw to the Federal workforce with zero strategy, zero strategy, and you all are doing nothing about it.

I just want to start with a little DOGE top five. We saw lies about millions of people collecting Social Security that wasn't true, having to roll back from $80-something billion to $7 billion, all these alleged savings, including the top five had to be pulled down. And then we see all these folks have to be rehired, like nuclear scientists, and folks who are bird flu experts, and the guy who has the keys to Yosemite National Park who apparently was fired, as well, which is nuts, by the way.

But we are talking about 1,000 National Park rangers doing amazing work, 120 National Wildlife Refuge employees, a 5 percent cut. And that was after a 31 percent reduction over the past 15 years. In Florida we have 29 national wildlife refuges, including in Cape Canaveral, Everglades, Ocala National Forest, the Pelican Island, and Indian River Lagoon. We saw 16 Florida employees fired just recently, and the only thing I can make of it, of these mass firings, is that they have one commonality. These are probationary employees. They could be experts. They could be the top managers. They could be the first-time employees. But all of them are in the government for one to 3 years, and they don't have rights yet. So, that is why we have had to rehire back some of these nuclear scientists and bird flu experts and, again, the guy with the only keys to Yosemite National Park, who was fired for some reason.

Mr. Rohlf, what is this going to mean as we are trying to work on the Kissimmee River, making it a wild and scenic river, and protecting the Everglades and some of these other key things we are working on? What do these cuts mean to these types of efforts?

Mr. ROHLF. Well, obviously, actions just simply can't take place without people to carry them out, and especially in the Endangered Species, Marine Mammal Protection Act context. We need expert scientists who know what they are doing. We talk about balance or trying to find ways that actions can go forward, economic actions can go forward while we protect endangered species. Well, doing so requires expertise. And we are losing that expertise.

I had a Fish and Wildlife Service special agent come and speak to my wildlife law class on Monday. He puts his life on the line to go after the bad guys that are importing and exporting endangered species parts. People from his agency are being randomly fired. He is getting emails saying, "Justify what you did last week." The morale of those agencies is in the tubes, and offices are empty. We simply can't keep going like this.

And I think what I have heard here today is absolutely correct. Congress needs to do its job and make sure that the expenditures that it has appropriated to run these agencies and make all of this work can actually do their jobs.

Mr. SOTO. And I appreciate that. One of the common things in Florida, we have a lot of these areas where we are protecting things like the manatee and the scrub-jay, the snail kite, and some of these others. These are some great areas with ranches or other farmland with national parks, and they are some of the top recreation places in Central Florida. We have massive bass tournaments on some of these lakes, and we have folks come in from all over the Nation. We have folks with hunting leases in and around these lands.

The thing that isn't highlighted a lot is that the Endangered Species Act allows us to help protect some of the best recreational land and local ranches in Florida. And it has stopped this onslaught of condos and suburbs out to the hinterlands of Central Florida. So, it is not an either-or. This is how we preserve some of the best lands for recreation, for agriculture, for species, and for a water supply that is in great danger, and something we have to keep in mind as we are looking at this.

And I yield back.

Ms. HAGEMAN. Thank you. The Chair now recognizes Chairman Westerman for 5 minutes of questioning.

Mr. WESTERMAN. Thank you, Chair Hageman. Again, thank you to the witnesses for being here.

Mr. Moore, we often hear about the difficulties of the ESA Section 7 consultation process, and a major part of that concern revolves around the scope in which the agencies look at a proposed action. In your experience, has U.S. Fish and Wildlife and National Marine Fisheries looked outside the scope of a proposed action during a consultation, and therefore prolonging the whole consultation process and increasing costs for project proponents?

Mr. MOORE. It is a tough question. The answer to that is it depends, and that is one of the things about working with the services is it depends on which office you are working with. And that is one of the difficult challenges in working under the species protection laws is that there is no uniformity from place to place.

In general, they look at the action area when you are going through Section 7 consultation. The action area is supposed to be the extent to which any environmental effect from the proposed action could occur. Traditionally, if you are looking at an impact to a waterway from construction activity, you look at in-stream construction, you look at activities that take place outside of the water, as well, including sedimentation that could enter into the waterway.

And the services originally would look at the reasonable distance in which sediment would travel. More recently what has happened is that, through actions of some within the services and more frequently with some of the Federal courts, they have required you to go much further. So, rather than looking at a couple of hundred yards in which sediment might travel before it disperses or dilutes, you are looking at 30 or 40 miles downstream, which causes the impacts analysis to sweep in every single species that occurs there, even though there is no remote potential for that species to be impacted.

The result of that is that you sweep in an entire suite of additional species that have to be analyzed, which makes the job more complicated, which causes more time and more money, and it stretches the Service's resources to an even greater extent, which doesn't allow them to do the job that they have been tasked with doing for other projects.

So yes, it is kind of a compounding effect that happens, and it all comes back to what is actually the impact of a project. And it is not 30 or 40 miles from the location where it occurs.

Mr. WESTERMAN. It does sound like it can be a complicated process. Do you have recommendations on how to improve that process, where it does, for lack of a better word, use common sense when looking at one of these actions?

Mr. MOORE. Absolutely. I mean, the science is the science. It is not something that courts are in a position to interpret. It is not something that opponent groups are in a position to say what is the best science.

Fish and Wildlife Service, in particular, for a long time recognized the bounds that a traditional impact would expand or extend.

That has been replaced with the opinions of various individuals that have caused courts and some within the Fish and Wildlife Service to broaden their interpretations. Establishing something more uniform for a typical type of impact, the distance that extends the scope of the actual effects, would really streamline the process.

Mr. WESTERMAN. Thank you.

Mr. Weiland, I have used more time on that, but I think we got some good information on it, but I was wanting to ask you about using the phrase "cognitive bias" to describe U.S. Fish and Wildlife mentality towards the Bone Cave harvestman species. Could you elaborate on what you meant by that?

Mr. WEILAND. Sure, happy to do so. So cognitive bias is essentially where there is a systematic bias in one's thinking away from rational thinking, and they are prevalent for everybody in society. It is just the way we work.

But in the conservation context it frequently comes up, for example, well, let me start with confirmation bias. And confirmation bias is just the idea that once you have a set idea, that you are going to view any information that comes in that confirms that idea in a way that is favorable and that disputes that idea in a way that is not. So for example, with regard to the Bone Cave harvestman, if you decide that it is endangered, and that part of the reason it is endangered is because it lives in these subterranean areas but that they could be affected by surface activity like development of projects, that you will continue to be concerned about that surface activity and continue to think the species is endangered, even when evidence to the contrary exists over decades of time when you find it more common and able to withstand those surface impacts.

Mr. WESTERMAN. Thank you. We are out of time, and we will submit some more questions for the record.

Thank you, Chair Hageman.

Ms. HAGEMAN. Thank you, Mr. Chairman. The Chair now recognizes Ms. Brownley for 5 minutes of questioning.

Ms. BROWNLEY. Thank you, Madam Chair, and thank you to the panel for being here.

We have talked a lot today already about how we really, truly rely on these expert agencies like Fish and Wildlife and the National Marine Fisheries Services. Professor Rohlf, can you talk a little bit about the impacts of under-funding these two critical agencies?

I think you were saying we need the money, and we need to spend it, and we need to execute what we have. But I think, at least in my opinion, I think we are sorely under-funded in terms of our goal of climate and protecting biodiversity and protecting species.

Mr. ROHLF. Certainly, some criticize the Endangered Species Act, for example, for what they see as the slow pace of species recovery. As I indicated in my opening remarks, most species are actually on track with the timing of their recovery plan toward achieving recovery. But it is amazing that they are, actually, because recovery measures are so under-funded by Congress. We are under-investing in precisely the job that we have given to the Fish and Wildlife Service and the National Marine Fisheries Service to recover species, and then some people complain about that. So if we actually

adequately funded those species or those species' recovery efforts, we would be recovering species and removing them from the list much more quickly.

A Member also talked about the States. And actually, the States could have a tremendous role in preventing more species from becoming threatened or endangered. That would be a wonderful thing that the States could do, and especially when people in those States complain about the Endangered Species Act. Sure, prevent species from becoming endangered.

But those States' fish and wildlife agencies have very little funding, as well. They spend it all on species that are hunted or fished, and not on non-game species that desperately need conservation. The Recovering America's Wildlife Act was not passed by Congress. That would have been a tremendous investment in the States for them to use their local knowledge to protect species before they need to be listed as threatened or endangered.

Ms. BROWNLEY. Thank you for that. And you just mentioned States. Is there anything more that we need to know from you in terms of if we transferred authority away from the Federal agencies, if we transferred those authorities to the States, and what the impacts might be?

You just talked about what States could be doing, but with the lack of the Federal agencies' oversight.

Mr. ROHLF. Sure. Well, of course, as I just noted, many States——

Ms. BROWNLEY. Yes, yes.

Mr. ROHLF [continuing]. Lack the resources to manage the vast number of species within those States. So those agencies would have very little to do because they would say we just don't have the resources to do it.

But also, threatened and endangered species move around. They occur throughout the country. So, those uniform protection standards and management standards that are provided by the Endangered Species Act to facilitate their recovery, in fact, speeds their recovery with those national resources, as well as those national standards.

Ms. BROWNLEY. Thank you. And last, we have talked a lot today, too, about the balance of economic interests and environmental interests. And can you speak a little bit more to your perception and what you see in terms of the economic impacts?

Folks on the other side of the aisle continue to say those impacts are very, very significant. Can you talk a little bit more about how you see it?

Mr. ROHLF. Sure. I think it is really unfortunate that we oftentimes get into a species versus people kind of situation. So the President's proclamation about California water was saying put people over fish. It is absolutely a false dichotomy.

Ms. BROWNLEY. Yes.

Mr. ROHLF. It turns out that people need water, just like fish. So when we look at the management of the Bay Delta system in the San Joaquin and the Sacramento Rivers in California, great example. Guess what? Water needs to flow down that system for fish, salmon, as well as fish like delta smelt. But water needs to flow through the system to do things like prevent saltwater intrusion

from the ocean that swamps the water delivery systems for millions of people.

So when we actually make ecosystems work better for listed species, it helps people and it helps our economy.

Ms. BROWNLEY. Thank you. Thank you.

And I yield back, Madam Chair.

Ms. HAGEMAN. Thank you. The Chair now recognizes Mr. LaMalfa for 5 minutes of questioning.

Mr. LAMALFA. Oh, I am sure glad we swayed into water in California.

[Laughter.]

Mr. LAMALFA. During that, you talk about that Bay Delta issue there, where I can show you the stats where 29 million acre-feet during a 15-month period, oh, a little over a year ago in the snapshot, 29 million acre-feet entered the Delta, and 22 million feet went out in that period.

And people got to capture only a little bit of that water. And even then, when you do, the water is stored behind dams. It has to be let out only for maintaining a temperature of one degree cooler in a river and is unavailable to agriculture, which is being devastated in the San Joaquin Valley. And the agriculture in that area would be thriving more so if you could have the groundwater recharge for the subsidence they are worried about under what is called the sigma law, but we can't get there, so we don't get to run the pumps except for 40 percent of capacity to fill the reservoirs. It goes on and on.

And it is interesting to hear in Committee today that the Endangered Species Act really has no price, and I also hear there is no limit, and that is what it more feels like for farmers and ranchers and timber people and miners that need to mine the products if we are going to electrify everything in this country. But let me narrow it back down to a question here.

Mr. Weiland, we have great concerns about what is going on at one of the agencies, at NMFS, and it is probably across the board at many others, that the staff there will place mandates on infrastructure projects that would have billions of dollars in direct or indirect economic impact, and are able to do so with little or no approval from political appointees above them or us in Congress. So giving mid-level personnel this amount of authority without accountability to Congress, as we are accountable to the people, it seems to me like it is a real recipe for disaster, since some people don't care what any of this costs on recovering a species.

[Chart]

Mr. LAMALFA. And then, look at the ratio of recovered species on this graph I have here: 1,732 are listed; and 11 have gone extinct during that time; 21 were delisted due to data error. So 57 out of that 1,732 have been recovered by whatever criteria.

So, when we give mid-level personnel this amount of authority to name these conditions at no price, what is your experience with this? Unfortunately, we are not made out of money. How does this look in modern-day decision-making?

Mr. WEILAND. Well, from the perspective of the regulated community, everybody knows they really prefer predictiveness and stability. So, one of the challenges that Mr. Parker alluded to is that

there is a lot of diversity in individual cultures. So, for example, no big surprise that in California the regulators can be more aggressive than in some other parts of the country and more difficult to work with.

Mr. LAMALFA. Yes.

Mr. WEILAND. Part of that has to do with the agencies themselves, and there is no reason that at NMFS and Commerce and Interior with the Fish and Wildlife Service they can't exercise authority and they can't try and create uniformity. And there is value in doing that——

Mr. LAMALFA. But there seems to be no limit on price with them. They don't care how much it costs, it seems.

Mr. WEILAND. I agree that one of the challenges is, a common occurrence I see in California is the view of agency personnel that their job is to protect the species, rather than implement the Acts. And those are different, and they are only slightly different, but importantly different, right?

Mr. LAMALFA. Yes.

Mr. WEILAND. Because if you look at the Acts as a whole, they do contain limitations on their ability to do that. So, I think that there are, as I mentioned, there are staff that understand that.

Mr. LAMALFA. OK.

Mr. WEILAND. But their——

Mr. LAMALFA. I want to get to another question on top of this, too. Thank you. Sorry about that.

We have in the northern part of my district and Mr. Bentz's district, as well, a rampant wolf population that is devastating livestock there. So, I guess I would like to ask panelists.

At a recent hearing up there in the north, one of the questions posed to the personnel from the government was, "What is the right amount of wolves now?" What number do we have that we consider the wolf recovered, and how do we reach the goal? Or is there actually a goal or do we just keep moving the goal posts around?

Do you want to take a stab at that, Mr. Rohlf?

Mr. ROHLF. Sure. The statute specifies that an endangered species is one that is in danger of extinction throughout all or a significant portion of its range, and that decision should be based solely on science. So we should look to the science to determine the distribution.

Mr. LAMALFA. Well, what does the science say on how many wolves we have until we hit the mark, hit the goal? Especially in Northern California, there are a gazillion of them in the upper Midwest. How many gray wolves do we need in Northern California to hit the mark?

Mr. ROHLF. Actually, if you look at the genetic requirements for a functional wolf population, we are not there.

Ms. HAGEMAN. I would fundamentally disagree with that assertion.

Mr. LAMALFA. That is the thing. They don't have a target. There is no number.

Ms. HAGEMAN. But we are going to have——

Mr. LAMALFA. I yield back.

Ms. HAGEMAN. We are out of time. I am going to have to go on to the next questioner, and I call on Mrs. Dingell for her 5 minutes of questions.

Mrs. DINGELL. Thank you, and I have a great respect for my friend from California, and I would say that a lot of us do care about the cost of programs, but I am going to go back to a famous Benjamin Franklin quote: "An ounce of prevention is worth a pound of cure." So I think we need to be investing more to keep some of these issues.

But as co-Chair of the Endangered Species Act Caucus, I remain committed to preserving the mission of the Endangered Species Act. For over five decades the Endangered Species Act, or ESA, has been our Nation's most successful tool for protecting America's imperiled wildlife. It has prevented the extinction of some of our most beloved animals like the bald eagle, the grizzly bear, the Florida manatee, and many more. And as this country is battling the impacts of climate change, from coastal flooding to wildfires, the protections from the ESA are more critical than ever, and we have to remain committed to preserving them.

Healthier wildlife populations lead to healthier ecosystems, which result in stronger shorelines, less intense wildfires, enhanced water quality, and fewer pests. Studies show that 99 percent of species listed under the ESA have avoided extinction. Let me repeat that: 99 percent. Yet today, despite its successes, we continue to see attempts to strip it, the ESA, of its provisions, making it harder to protect wildlife.

Last Congress, Committee Republicans introduced CRAs to delist imperiled species and proposed the ESA Amendments Act of 2024. This bill would delay new listings while fast-tracking removals and narrowly re-define key terms to limit the ESA's reach.

Currently, there are about 1,300 endangered or threatened species in the United States, and I want to see these species delisted. He was talking about the wolf, the gray wolf. We are getting there. But the best proven path forward is to invest in their recovery.

The Chairman likes to say, "Build it and they will come," and I agree. That is why I remain committed to passing legislation like the Recovery in America's Wildlife Act, or RAWA. It has been a top priority, I know, for many of us, for sportsmen, conservationists, hunters. RAWA will help promote and enhance our Nation's conservation efforts by proactively investing in State efforts to prevent at-risk wildlife from becoming endangered in the first place. And I am hopeful I can work with my colleagues in this Committee this year. We will reintroduce the bipartisan legislation and get it done.

But in the meantime, Mr. Rohlf, it is important we continue to strongly support the ESA to ensure species that are already in decline, and that includes identifying vulnerable species early. Mr. Rohlf, how is it that species get listed so late in the process, making decisions increasingly difficult for everyone involved?

Mr. ROHLF. Well, one of the problems, Representative Dingell, and I certainly honor your family's legacy with the Endangered Species Act, is that the agencies that are tasked with making listing decisions for those species are oftentimes well under-funded. So, there is a long list of species that the agencies have determined

warrant protection as threatened or endangered, but their listing is precluded by higher-priority species that the agencies are working on because of the agencies' limited resources. And in fact, Congress amended the statute to allow that sort of parking place for species that deserve listing but the agencies simply don't have the resources to list them in a timely fashion.

So better and more resources to the Fish and Wildlife Service and National Marine Fisheries Service could allow them to list species earlier, when recovering them is easier.

Mrs. DINGELL. So in 35 seconds, how will proposed budget cuts in workforce firings impact recovery prospects for species?

Mr. ROHLF. What we are seeing going on, especially with a loss of Federal expertise, is going to be devastating for not only species recovery, but, as I noted, for those agencies' ability to do the work they need to do to even allow permits for other actions to go forward.

Mrs. DINGELL. Thank you. I just hope that if we want to delist species, we need to invest in the recovery.

I thank you, Madam Chair. I yield back.

Ms. HAGEMAN. Thank you. The Chair now recognizes Mr. Crank for 5 minutes.

Mr. CRANK. Well, thank you, Madam Chair. I have learned a lot about things today in the hearing. Especially, I didn't know that Yosemite Park must be closed because there was one guy who had a key, and now we can't get it open. Oh, wait. Maybe there is somebody else who could open that.

Look, it is important to me that State and Federal partners are responsible managers of species. And Colorado Parks and Wildlife, my State management agency, has in the past done a pretty good job of letting science guide its management. As an example, the Colorado bighorn sheep has never been listed under ESA due to the State's management efforts. And as an avid hunter, I am proud to have directly contributed to the conservation as I purchased tags for those bighorn sheep for 20 years for a chance to hunt a bighorn sheep. It is currently mounted in my office, and I would love to have anyone come by if you would like. Hunters play a critical role in species management and preserving State and public lands, as portions of hunting licenses often fund State conservation efforts.

Congress uses the term, by the way, "best available science" several times in ESA and MMPA statutes to guide the direction of Fish and Wildlife and NMFS in the conservation of the species. To put a species under the ESA, Fish and Wildlife must use the best available science and commercial data to list, delist, or reclassify a species.

For the gray wolf, Fish and wildlife has made numerous attempts to delist the species under both Republican and Democrat administrations, as the population has exceeded its recovery goals, but we haven't had success in that delisting. Instead, Fish and Wildlife has had to face serial litigants over every attempt, claiming they didn't use the best available science when moving forward with decisions to delist the gray wolf.

Yet, groups like the Alliance for the Wild Rockies, WildEarth Guardians, and Center for Biological Diversity that exploit the best science requirements in ESA turn around and push for gray wolf

reintroduction to be included on the Colorado ballot in 2020. So the Center for Biological Diversity profited over $1.8 million in Fiscal Year 2023 from lawsuits at the Federal Government related to NEPA and ESA.

Madam Chair, I ask unanimous consent to insert this letter to Governor Polis from September 2022, signed by the Alliance for the Wild Rockies, WildEarth Guardians, and Center for Biological Diversity and others to reintroduce wolves to Colorado into the record.

Ms. HAGEMAN. So ordered.

[The information follows:]

September 9, 2020

Governor Jared Polis
State of Colorado
200 E. Colfax Ave
Denver, Colorado 80203

Director Dan Gibbs
Colorado Department of Natural Resources
1313 Sherman St., #718
Denver, Colorado 80203

Dear Governor Polis and Director Gibbs:

On behalf of our members from Colorado and across the nation, the undersigned conservation organizations endorse the reintroduction of gray wolves to western Colorado. Reintroducing wolves would go far to restore the natural balance to Colorado's Rocky Mountains for generations to come. It would also complete the return of wolves across the entire Rocky Mountain chain from Alaska to the U.S. Southwest, a wildlife restoration success of global significance.

Gray wolves inhabited the southern Rocky Mountains of Colorado for thousands of years until 1945, when the last one was killed in southwestern Colorado. Wolves evolved alongside their prey such as deer and elk. Their absence has altered both prey and landscapes. Bringing wolves back will help restore this predator-prey balance, helping keep both the prey and the landscapes they graze healthier.

Wolf reintroduction to Yellowstone National Park and the northern Rockies in 1995–96 resulted in documented benefits to the fish, wildlife, and plant communities of the region, including growth of streamside vegetation that has benefited fish, amphibians, beaver, and songbirds. Moreover, scavenging animals such as bears, eagles, and wolverines have benefited from the leftovers of wolf kills.

Today, roughly 1,800 wolves live in the northern Rockies region of Montana, Idaho, and Wyoming, alongside robust populations of deer, elk, livestock, and of course people, including wolf-watching visitors from all over the world. But those benefits have not accrued to Colorado because the very few wolves that have migrated south from the northern Rockies have not been numerous enough to establish a population. Colorado requires wolf reintroduction for a viable population to reoccupy the vast, highly suitable public wildlands of the western half of the state.

Just as occurred in the northern Rocky Mountains, reintroducing wolves to western Colorado would restore the natural balance to the southern Rocky Mountains. Reintroduction would also provide an inspiring example of Coloradans correcting a mistake of the past—the extermination of wolves—through science-based restoration.

We strongly support the reintroduction of wolves to the public lands of western Colorado. Returning the missing howl of the wolf to the Colorado wild would greatly enhance the natural beauty and ecological health of Colorado's Rocky Mountains.

Respectfully yours,

Erik Molvar
Western Watersheds Project

Tehri Parker
Rocky Mountain Wild

Mike Phillips
Turner Endangered Species Fund

Jonathan Proctor
Defenders of Wildlife

Mike Garrity
Alliance for the Wild Rockies

David Jenkins
Conservatives for Responsible Stewardship

Kelly Burke
Wild Arizona

Craig C. Downer
Wild Horse and Burro Fund

Dave Willis
Soda Mountain Wilderness Council

Amanda Dumenigo
Save Our St Vrain Valley

Michael Stocker
Seven Circles Foundation

Dan Silver
Endangered Habitats League

Hailey Hawkins
Endangered Species Coalition

Suzanne Roy
American Wild Horse Campaign

Michael Kellett
RESTORE: The North Woods

Michael J. Robinson
Center for Biological Diversity

James Kleinert
Horse Medicine Productions

Rick Meril
Coyotes, Wolves and Cougars Forever

Charlotte Roe
Wild Equid League of Colorado

Kimberly Baker
Klamath Forest Alliance

Thomas Wheeler
Environmental Protection Information Center

Lisa Robertson
Wyoming Untrapped

Melanie Hill
WILD Foundation

Shelley Coldiron
W.O.L.F. Sanctuary

Stephanie Jane Harris
Animal Legal Defense Fund

Jennifer Thurston
Information Network for Responsible Mining

Peter McCollum
Save Animals Facing Extinction

Mark Pearson
San Juan Citizens Alliance

Shelley Silbert
Great Old Broads for Wilderness

Lindsay Larris
WildEarth Guardians

Norman Bishop
Wolf Recovery Foundation

Kirk C. Robinson
Western Wildlife Conservancy

Ariel Moger
Friends off the Earth U.S.

Delia G. Malone
Sierra Club, Colorado Chapter

Rob Edward
Rocky Mountain Wolf Action Fund

Michael Petersen
The Lands Council

Mary Harris
Roaring Fork Audubon

Tim Whitehouse
Public Employees for Environmental Responsibility

Tom Sobal
Quiet Use Coalition

Christine Canaly
San Luis Valley Ecosystem Council

JoAnn Hackos
Evergreen Audubon

Tracy Coppola
National Parks Conservation Association

Laura Leigh
Wild Horse Education

Robert Hall
Christian Council of Delmarva

Jonathan Way
Eastern Coyote Research

Courtney Vail
Oceanic Preservation Society

Nancy Warren
National Wolfwatcher Coalition

Joseph Butera
Northeast Ecological Recovery Society

Michael J. Painter
Californians for Western Wilderness

Jonathan Carter
Forest Ecology Network

Nedim Buyukmihci
Unexpected Wildlife Refuge

Earl L. Hatley
LEAD Agency, Inc.

Karen Tuddenham
Sheep Mountain Alliance

Jason Christensen
Yellowstone to Uintas Connection

Kim H. Crumbo
The Rewilding Institute

Courtney Vail
Oceanic Preservation Society

Lois Barber
EarthAction

Wally Sykes
Northeast Oregon Ecosystems

Beth Allgood
International Fund for Animal Welfare

Kelly Nokes
Western Environmental Law Center

Moana Bjur
Conservation Council for Hawaii

Marc Cooke
Wolves of the Rockies

Dan Ritzman
Sierra Club

Darlene Kobobel
Colorado Wolf and Wildlife Center

Leesa Carter-Jones
Captain Planet Foundation

Camilla Fox
Project Coyote

Adam McCurdy
Aspen Center for Environmental Studies

Richard Pritzlaff
Biophilia Foundation

Noah Long
Natural Resources Defense Council

Heidi McIntosh
Earthjustice

Jessica Plachta
Lynn Canal Conservation

Mr. CRANK. Rather than letting science and data guide the reintroduction of the gray wolf in Colorado, these groups pushed to mandate reintroduction and relied on ballot box biology, leaving little flexibility in the reintroduction program for Colorado Parks and Wildlife. Coloradans who didn't want wolves in the first place now have to contend with them living in their backyards because people in Denver and along the Front Range voted to put wolves in someone else's backyard on the Western Slope. It is clear that environmental groups use the ESA as a weapon against project development to stifle innovation and to cherry-pick science to adhere to their feelings about species management.

Mr. Moore, we have continually seen serial litigants exploit the term "best available science" in the ESA by selectively choosing different factors, sometimes even administrative factors, to justify

litigation on species such as the gray wolf. Do you see in your work instances of how this impacts agency decision-making to the detriment of species recovery?

Mr. MOORE. Without question. The tactics that are used frequently by the environmental groups, particularly the wildlife environmental groups, are an absolute detriment to species recovery and the implementation of both the Marine Mammal Protection Act and the Endangered Species Act.

One of the tactics that is in addition to the parade of sue-and-settle lawsuits that they use to fund their war chest more recently has been to insert themselves into the Section 7 consultation process. That is a process that is not designed, does not contemplate, and does not authorize the participation by anyone except for the Federal agency and the applicant for the permit that is being sought.

They have done an end-round around that process, however, by using public dockets such as the FERC docket to dump tens of thousands or more pages of immaterial science on the agencies at the eleventh hour before the agency is getting ready to make a decision, and then claim that the decision that the agency made was not based on the best available science that they injected into the record, use that to sue, get the attorney's fees when they win, and then use those fees to sue again.

So absolutely, it is a process that is broken. It was never intended to function that way, and it is something that needs to be fixed.

Mr. CRANK. Thank you, Mr. Moore.

Ms. HAGEMAN. Thank you. The Chair now recognizes Mr. Min for 5 minutes of questioning.

Mr. MIN. Thank you, Chair. Thank you, Chair Hageman, and also to Ranking Member Hoyle. I appreciate today's hearing.

I want to first recognize and thank Mr. Paul Weiland for traveling all the way to D.C. Mr. Weiland is a constituent of mine.

And I appreciate that you brought some good California weather out here. It is very nice and warm outside.

My district is in the heart of Orange County. I am sure Paul could tell you all it is home to a lot of beautiful, outdoor spaces that are habitats for a lot of endangered and rare species. And instead of talking about solutions to address the biodiversity crisis that we are clearly facing, we have been hearing today a lot of mischaracterizations and half truths about foundational environmental protections that have served for decades as the last line of defense for many of our species.

Now, some folks want us to believe that in the aftermath of the Supreme Court's *Loper Bright* ruling, which ended *Chevron* deference, that laws like the Endangered Species Act must be radically cut back in the name of executive overreach. Now, I will point out that there is a lot of executive overreach happening right now that is not being addressed, including direct incursions on our congressional powers to legislate and to appropriate.

But I want to go back to the Endangered Species Act, because this follows a long pattern of attack that predated the *Loper Bright* decision, and goes back many years. Last Congress alone, at least 115 bills and amendments were introduced to undermine the ESA.

In the absence of *Chevron* deference, of course, agencies are constrained in their ability to interpret ambiguity in our laws, requiring them to adhere to the plain meaning of the text unless Congress specifically states otherwise. But there are few laws that are as clear that are on the books as the Endangered Species Act and the Marine Mammal Protection Act. Their mandates to prevent extinction and promote species recovery are reinforced in every section of their text.

My first question is a yes-or-no question. Mr. Vecchione, I will ask this one to you. Do you believe that Federal agencies like Fish and Wildlife Service should honor the plain meaning of our laws?

Mr. VECCHIONE. Yes.

Mr. MIN. And do you agree that, when there is an ambiguity in the law, the interpretation of the courts must be followed?

Mr. VECCHIONE. Yes.

Mr. MIN. So over 40 years ago, in *Tennessee Valley Authority v. Hill*, the Supreme Court stated that the plain intent of Congress in enacting the Endangered Species Act was to halt and reverse the trend toward species extinction, whatever the cost, and that the benefits for doing so were incalculable.

Now, Professor Rohlf, you have read through many of the Republican ESA proposals over the years. Does adding ambiguity and exceptions to the ESA, as many are proposing, improve species outcomes? Does it help fulfill its mandate as reaffirmed by the Supreme Court?

Mr. ROHLF. No, absolutely not. Most of the proposals to amend the Endangered Species Act that I have seen over the years would weaken the statute considerably, and make it much more difficult to attack the biodiversity crisis.

Mr. MIN. How about if we try to undo decades worth of environmental review regulations and remove guidance on the National Environmental Policy Act, as this Administration has done? Is that something you see as helping or hurting with the ambiguity?

Mr. ROHLF. It is doing tremendous damage to our efforts to not only protect the endangered species, but also to make sure that protections for endangered species are compatible with what people need, as well.

Mr. MIN. Yes.

Mr. ROHLF. I mean, that is an important part of both NEPA and the Endangered Species Act.

Mr. MIN. Yes.

Mr. ROHLF. And to weaken the Act, to deprive Federal agencies of resources to implement it——

Mr. MIN. Well, I know you——

Mr. ROHLF [continuing]. Just makes it harder.

Mr. MIN. And reclaiming my time, just to follow up on that, what about the Trump-Musk cuts, as you referred to, to workforce at Fish and Wildlife Services? Does dismantling agencies charged with enforcing these laws help the government fulfill the plain meaning of the ESA?

Mr. ROHLF. It is absolutely devastating.

Mr. MIN. Yes. And I will just note that the community I represent, as Mr. Weiland knows, where do you live, exactly? Remind me, Mr. Weiland.

Mr. WEILAND. Right off the 133.

Mr. MIN. Oh, fantastic. You are a little bit north. Do you enjoy outdoor activities? Fishing, hiking, biking, any of that? Surfing?

Mr. WEILAND. I do enjoy our environment.

Mr. MIN. Yes, we have quite a lot of beautiful outdoor spaces. Mountains, hills, lots of walking trails, beautiful coastline. But unfortunately, we are also subject and on the front lines of a lot of the climate change that we are seeing.

And whether it is our shoreline that is eroding every year, whether it is the extreme temperatures, the drought that we are facing, we are facing a lot of threats to our ecosystems right now, and that is one of the reasons that the first piece of legislation that I introduced as a Member of Congress was the Aquatic Biodiversity Preservation Act, which would provide new tools to sequence the genetic information of at-risk species in our oceans and waters, and to ensure that this data is available for researchers, conservation planners, and the general public so that we can try to get a handle on what is happening with extinction, and the loss of biodiversity happening in our coastline.

Rising ocean acidification, rising temperatures have really threatened these fragile marine ecosystems, and that is something that I know a lot of my constituents care deeply about. It is one reason why we have been so aggressive, I have been so aggressive in my career in trying to preserve that scarce biodiversity. And I worry about the effects of this approach that is being discussed today.

But with that I yield back.

Ms. HAGEMAN. Thank you. The Chair now recognizes Ms. Maloy for 5 minutes of questioning.

Ms. MALOY. Thank you, Madam Chair.

Thank you all for being here today. You are actually a really great panel.

And I just want to point out that I have some real-world experience with dealing with ESA regulation and policy. I have Utah prairie dogs, Mojave Desert tortoises, various fish species in my district, and I have also been involved in the State's efforts to avoid the listing of sage grouse and gray wolves in Utah. I worked as an attorney on renewing an incidental take permit for one of those species, and I know firsthand how difficult it is to satisfy the ESA requirements in light of the regulations that have been enacted since 1973. So I appreciate a lot of what has been said here today.

But Mr. Vecchione, I hope I am saying your name right.

Mr. VECCHIONE. That is fine.

Ms. MALOY. I was really struck by something you said about one of the factors that impacted the court's decision in the *Loper Bright* case was a resistance to regulation changing when the statute doesn't change. And I think that is the crux of this whole issue. We are going back and forth on some partisan issues, but I want to echo what Chair Hageman said about we need to do a better job of being really clear, as Congress, about what it is we are asking agencies to do.

We also need to be more robust in our oversight of those agencies. What we have done is neglect the agencies, and then policies swing back and forth every time we have a presidential election.

And there are a lot of things I would love to talk to you about, but I only have 5 minutes. And since the Chair did such a great job of talking about that, I just want to say I echo what she says and yield the rest of my time to Chair Hageman. Thank you.

Ms. HAGEMAN. Thank you, Ms. Maloy.

And Mr. Vecchione, I am going to focus on you again, because I do think it is important.

We have talked a lot about the Endangered Species Act today, but we also need to focus back on the *Loper Bright* decision in reversing the *Chevron* decision. And what I would like to ask with you, as a practitioner, with all of the various cases that you have handled over the years with agencies that really have gone rogue in many ways, they are not implementing the law as it was written by Congress but they are implementing the law as they have interpreted it or reinterpreted it either through regulations, guidance documents, issuing answers to frequently asked questions, all of the various ways in which agencies have amassed more and more and more power since the APA was adopted in the late 1940s, could you just provide us with some of the ideas that you have that would help Congress to do better in terms of actual lawmaking so that we can minimize either judicial or agency interpretation of what it is that we are putting down on paper?

Because, again, under Article I, we are the ones that should be writing the law. We should be able to do that well. And I would love to hear what your advice might be in that regard.

Mr. VECCHIONE. Well, there are a couple of things.

First of all, we still have to defer to all the agencies on whatever they say about the science. The courts defer to that unless it is way out there. OK? If it is arbitrary and capricious what they did, or if they didn't take into account some last-minute data that was put in under the APA, you can get those knocked out. But the judges will still defer on the facts.

And there is no Daubert. If I want to put in a testimony from an expert, I have to show he is an expert and he used proper methodology. The agencies don't have to do that.

And in this case something struck me. I have never looked at it before. I looked at the right whale proposal, and that is where I argued *Relentless*, right in Boston where it starts. And they said there are about 500 of these whales left, there are 100 female whales, but because of the nature of the Atlantic they can't know where they are.

I find it incredible, the amount of money that is spent by slowing this down. Do you know why they are called right whales? They are called right whales because when they hunted the whales into extinction, they loved them because when they are killed they float so you could go out on Nantucket and get them, and they were very easy to process. So, it strikes me as odd that they have never asked for the money to tag these whales so that they are actually navigational obstacles to all the ships. How much would that cost?

We had to believe the science in their proposal. That strikes me, as a sailor and a guy who is up there and has been in these whale places, because I am a whale guy, that they can't find those whales and tag almost all of them with an electronic beeper so that all

these boats would know where they were. So that is one thing, how the science is done.

The other thing is when you have oversight, you should be asking them why they are doing this, why aren't they delisting, or why are they listing, or that question, how many of these do we need, right? The gray wolf, it is the most successful predator in the world. It is found on every continent but Antarctica. If you don't kill them and trap them and poison them, they are going to come back.

Ms. HAGEMAN. That is right. That is exactly right.

I appreciate the advice that you have provided, and I think that we need to look into better defining what is meant by the best available science and what the agencies need to produce to actually support and defend the decisions that they are making. Because, like you, I have to bring in my own expert witnesses, and I am required to meet a certain burden of proof. But in the regulatory or guidance context, especially, agencies are not. And I think that that is where we need help with revising the APA to force that issue when they are doing rulemaking.

Thank you, and with that, I call on Mr. Gray for his 5 minutes of questioning.

Mr. GRAY. I would like to thank the Chair and the Ranking Member for holding this hearing today, and certainly thank you to the witnesses for being here.

I represent a district in California, part of the largest agricultural valley in the world, and a place I am proud to be from and have participated in that very ag economy. But it is a common conversation back home as we seek to balance both the need to protect the environment and be good stewards of the land and at the same time protect the industry that is critically important to our valley and to this country.

And in California, as you can imagine, these issues get pretty polarizing. And folks oftentimes seem to put themselves in one camp or another. I am either pro-wildlife or pro-water access, right? And the reality is both of these things are critically important, and we should be striving to ensure that our farmers have access to the water they need while also protecting the delicate ecosystems that are influenced by these systems. I have certainly seen firsthand how people struggle when this balance turns into a zero sum game and people stop listening to each other. We really do need to find that balance, and it is certainly something I am committed to during my time here in Congress.

Mr. Moore, President Barack Obama observed that it makes little sense to have two different departments, Interior and Commerce, regulating the same species of fish depending on whether that species was in the ocean or was in inland waters. And there are circumstances, like the Klamath Project, where biological opinions issued by the Fish and Wildlife Service are inconsistent with biological opinions issued by the National Marine Fisheries Service. Do you think the goals of the Endangered Species Act could be better served by consolidating authority to implement the Act in one department, the Department of the Interior?

Mr. MOORE. Was that to Mr. Rohlf or to me?

Mr. GRAY. Mr. Moore.

Mr. MOORE. OK, yes. I mean, I think that there is sense to unifying the expertise among the Federal agency and the science and those who know best. But at the same time, there are separate processes between what the National Marine Fisheries Service handles and what the Fish and Wildlife Service handles. And the jurisdictional scopes of both of those agencies at this point appear to be working rather well. What is not working well is the way that they individually implement the statutes or the species under their charge.

At the same——

Mr. GRAY. Thank you. Thank you, I appreciate that.

Mr. Weiland, thank you for your testimony today. As you likely know, another place where implementation of the ESA has been a challenge is during FERC licensing and relicensing of hydropower facilities. Hydropower currently makes up about 40 percent of the Nation's overall renewable electricity, certainly an essential resource and quite a bit in my district. However, in the next 10 years alone, FERC licenses for nearly 300 hydropower projects comprising over 11 gigawatts of authorized capacity and over 25 percent of the entire fleet of non-Federal hydropower capacity will expire.

While this Subcommittee isn't involved with the Federal Power Act, it does have jurisdiction on the Fish and Wildlife Service and the NMFS, which are both mandatory conditioning agencies that frequently contribute to the length and cost of the FERC process.

I continue back home to hear about hydropower projects being held hostage by Federal agencies, imposing onerous fish passage and species protections, requirements that make hydropower owners and their electric customers address issues way beyond the actual effects of the project, with little recourse to challenge. Do you have any experience in projects that have run into these issues?

And what steps can we take to ensure that the implementation of the ESA doesn't end up killing critical hydropower resources or drive up costs for consumers?

Mr. WEILAND. Yes, thanks for the question. I do have experience working, particularly with National Marine Fisheries Service, on FERC relicensing and even on non-FERC projects that have to go through Section 7 consultation and that involve dams and dam operations.

And one of the challenges is the issue that the Chair and I discussed briefly earlier, which is how NMFS approaches the consultation itself, whether NMFS goes into it with a mindset of looking at the entirety of the operations as discretionary, and therefore subject to consultation so it can revisit how the dam is operated, whether it is operated, whether it needs to fulfill some passage requirements, whether it is trap and haul, or even a volitional fish passage like a fish ladder system and whether those are feasible.

And one of the challenges, frankly, with National Marine Fisheries Service is that there are dams all up and down the West Coast, and the National Marine Fisheries Service sees those as an obstacle to the historical populations of fish, which it is, but that doesn't mean it is an obstacle to those fish having viable populations, which is another issue. And I think that will be an ongoing

issue, and is an issue that many agencies on the West Coast face currently.

Mr. GRAY. Well, it is certainly a big problem——

Ms. HAGEMAN. Thank you.

Mr. GRAY [continuing]. From a holistic approach.

Thank you, Madam Chair.

Ms. HAGEMAN. Thank you.

Mr. GRAY. I yield my time.

Ms. HAGEMAN. The Chair now recognizes Ms. Hoyle for a request.

Ms. HOYLE. Madam Chair, I ask unanimous consent that Representative Don Beyer of Virginia have permission to sit on the dais and participate in today's hearing.

Ms. HAGEMAN. So ordered. And the Chair now recognizes Mr. Beyer for his 5 minutes of questioning.

Mr. BEYER. Madam Chair, thank you very much.

Professor Rohlf, I have just come in but I have heard lots of different things have happened in this meeting. I wonder, before I ask a few questions, if you have anything you would like to add.

Mr. ROHLF. Sure. I just want to reemphasize a couple of points.

First of all, protecting and recovering species, protecting their habitats, protects humans, as well. We depend on the natural world, just like imperiled species does or do.

The Endangered Species Act and its regulations actually build considerations of species and recovery predictably into everyday decisions of Federal agencies. Everybody has gotten used to that. And it has been really interesting to hear how, supposedly, when new administrations take over, regulations dramatically change. Well, the Endangered Species Act actually provides a good example. The regulations implementing Section 7 of the Endangered Species Act remained unchanged from 1986 to 2019, the dramatic changes in 2019 by the Trump administration. Looking at those regulations, which I did pretty extensively, most of those regulations would probably not survive judicial review under the *Loper Bright* standard, because they simply weren't consistent with a best reading of the Endangered Species Act.

So if we want to maintain that predictability, building in species recovery to everyday actions in a reasonable way, we should maintain those consistent regulations and not wildly adopt new regulations that don't make any sense under the terms of the statute as the first Trump administration did.

Mr. BEYER. Thank you very much. Professor Rohlf, you and I are both well aware that the Endangered Species Act is why we were able to stop the extinction of gray wolves in North America. Right now gray wolves are under State management in the northern Rockies, and Wyoming has a shoot-on-sight policy pretty much anywhere outside of Yellowstone. In 85 percent of Wyoming there are no requirements when killing a wolf. No hunting license, no bag limits, nothing that is typical of well-managed hunting. Wolves can't make it out of Yellowstone without being shot. Professor Rohlf, what does Wyoming's shoot-on-sight policy for gray wolves mean for the recovery of the species?

Mr. ROHLF. It obviously makes it more difficult. However, Congress legislatively delisted wolves in the northern Rockies,

which allows for Wyoming to have that shoot-on-sight policy. It doesn't make any sense from, as you said, a sporting standpoint. It also doesn't make any sense from the standpoint of managing an ecosystem. So, continued protection of wolves until they have recovered throughout all or a significant portion of its range outside of that legislatively delisted portion is obviously still important.

Mr. BEYER. Thank you.

I had the pleasure of working with the late American biologist E.O. Wilson in his last years, and he deeply believed that all life depends on essential ecosystems, and that damaging or erasing these ecosystems will have a profound impact on biodiversity and human health and well-being. Our Earth is currently facing a biodiversity crisis in species extinction. As you know, between 1970 and 2018, there has been an average 69 percent decrease in population sizes of mammals, birds, amphibians, fish, and reptiles. Professor Rohlf, can you elaborate more on how important a well-funded and well-enforced ESA is critical to reversing the course of damage to our biodiversity?

Mr. ROHLF. Well, of course, Congress recognized the incalculable value of biodiversity and species to humans. That issue came up in looking at the constitutionality of the Endangered Species Act. And one of the judges pointed to that value of biodiversity in saying that that affects interstate commerce, and that Congress has the authority and the obligation to the public to protect imperiled species.

To give you a good example, Gila monsters in the American Southwest are declining. They have been the subject of listing petitions. We should apply more resources to that species so they never need to be listed. It is one of the few venomous lizards. The venom of Gila monsters, important to developing drugs like Ozempic, which helps fight diabetes and is one of the most valuable drugs in the world right now to fight obesity. And without out those biodiversity, those genetic resources, we simply would not discover those sorts of valuable and lifesaving drugs.

Mr. BEYER. Professor, thank you for bringing that up. I would just like to point out that Mitch Daniels, the former Republican director of the OMB, pointed out that more than 30 percent of our Medicare budget is just type 2 dialysis, end-stage renal disease. So the Gila monster is going to save us an awful lot of money on Medicare.

With that, Madam Chair, thank you for letting me waive on, and I yield back.

Ms. HAGEMAN. Well, and thank you. And I do want to assure you that the Canadian gray wolf population in Wyoming is thriving, doing very, very well, despite the fact that they have been delisted.

The Chair now calls on Mr. Ezell for 5 minutes of questioning.

Mr. EZELL. Thank you, Madam Chair.

Today's hearing is about accountability, and I want to thank all the witnesses for being here today and sharing so much information. The Marine Mammal Protection Act and the Endangered Species Act were created with good intentions to protect species and ensure their survival. But over time these laws have been twisted into tools of overreach, allowing Federal agencies to impose sweeping restrictions.

The Supreme Court reaffirmed that it is Congress, not unelected bureaucrats, who decide the scope of these laws, yet we continue to see agency actions that go far beyond what Congress ever intended. Take the case of the Rice's whales in the Gulf of America. Policies like these threaten entire industries and livelihoods from shipping, fishing, recreation, and national security. We must ensure conservation efforts are balanced with economic and practical realities.

Mr. Weiland, I appreciated your testimony on NOAA's reliance on the precautionary principle. We have seen this play out on the Atlantic Coast with the North Atlantic right whale Vessel Speed Rule, which you rightfully called an observed outcome. And in the Gulf of America, with Rice's whales, both proposals would have crippled economies. I support conservation, but it must be grounded in sound science and common sense. This proposal has neither and, in my view, represents the gross overreach of agency authority. Do you believe Congress intended for NOAA to have the power to effectively shut down ocean industries like we saw attempted with the Rice's whales proposal?

Mr. WEILAND. No, I do not. I believe that when Congress enacted both the ESA and the MMPA, as I testified earlier, that there was a belief that species conservation could occur consistent with economic activity.

And I think what we see is a consequence of the lack of reauthorization to revisit and update the laws. And reauthorization shouldn't mean all or nothing. Either gutting the laws or making them more and more difficult to get through. We should be able to find a way to have common-sense reauthorization.

Mr. EZELL. Thank you. What changes could Congress make that might bring more balance to the law while still fulfilling its conservation mission?

Mr. WEILAND. There are a number of changes Mr. Moore actually pointed out, too, in his testimony, which he has provided specifically. But there are more that I could talk about than I have time for.

I will say one, for example, is just decoupling the Endangered Species Act and the Marine Mammal Protection Act. So right now, before you can get an incidental take statement under Section 7, you need your Marine Mammal Protection Act approval. And there is no reason that it has to be contingent on that. And that is just one very simple step, but there are many others that could be taken.

Mr. EZELL. Thank you.

Mr. Vecchione, one of the biggest frustrations I hear from my constituents, whether they are shrimpers, farmers, or energy producers, is that they spend years and, in some cases, millions of dollars trying to comply with agency regulations, only for the rules to keep changing based on lawsuits from radical environmental groups. To what extent do you believe litigation is driving regulatory instability under the ESA and the MMPA?

Mr. VECCHIONE. Is that directed to me? I think I have cited some of the cases. Sometimes they win, sometimes they lose. But it is the fact that you can have a friend inside of the agency and then sue

along with that to either help or hurt it is somewhat of a problem, it strikes me.

Mr. EZELL. Thank you, and thank you all for being here today. Madam Chairman, I yield back.

Ms. HAGEMAN. Thank you. The Chair now recognizes Ms. Hoyle for her 5 minutes of questioning.

Ms. HOYLE. Thank you.

Mr. Rohlf, I just wondered, as we finish up this hearing, if you have some final comments on what we have talked about today.

Mr. ROHLF. Yes, thank you very much, Representative Hoyle.

I appreciate everyone's concerns to uphold the policy behind the Endangered Species Act, which is to prevent extinction, and to facilitate the recovery of listed species, and also to prevent species from becoming threatened or endangered. I think we can all agree on those things.

How do we do that? How do we best do that? And is the ESA equipped to do that? Let me start with the second one.

I think the ESA is unequivocally equipped to do all of those things. Many States, property owners, and the Federal Government have worked together to try to prevent species from becoming threatened or endangered. The prospect of listing has fostered a lot of cooperation and innovation, and in some cases that has protected species before they need to be listed. That is working with the States, that is using State authority. And we should encourage and even fund those sorts of actions.

When species are imperiled, when the best available science, which should continue to drive decisions under the Endangered Species Act, indicates that species are in danger of extinction, then we should continue to adopt what Congress very clearly said was the "institutionalization of caution."

And my colleagues here have talked about the precautionary principle as if it is some sort of terrible thing that over-regulates everything and we should avoid. Well, actually, Congress was very clear in the Endangered Species Act that Section 7 and the prohibition against Federal agencies from taking actions that jeopardized listed species. Congress said when it enacted the Endangered Species Act, that that is the institutionalization of caution. And I would submit that that is a very wise idea, that we should institutionalize this sort of consultation process, basically building into permitting considering up front the needs of threatened and endangered species in making Federal decisions in permitting other actions to go forward such as oil and gas exploration in the Gulf or vessels navigating along the East Coast.

If we do that with adequate resources, using the best available science, in almost all cases we have been able to find ways of doing business that don't jeopardize the existence of threatened and endangered species, that minimize impacts to marine mammals, and still allow economic activities to go forward. Does that impose some economic cost? Yes, it may indeed. But we live with resources that we need, and we need to protect those resources that require some degree of investment. So none of that should come as a surprise. But on balance, protecting a functional environment protects us.

Finally, everybody talks about, oh, the courts are running this or running that. The courts really are not running anything. The

courts evaluate the decisions of Federal agencies in implementing the Endangered Species Act and Marine Mammal Protection Act. Sometimes economic interests challenge those decisions by regulators and they win. Sometimes environmental plaintiffs challenge decisions of regulators and they win. But all of those challenges and decisions by courts are based on the law itself, and the clear regulations under that statute, and an assessment of whether or not Federal agencies use the best available science.

So courts aren't running anything. Congress is running it. The Endangered Species Act and it is clear regulations are running what happens. So, I think, if we look over the last 50 years, the Endangered Species Act has been a resounding success, and I look forward to more decades of that success.

Ms. HAGEMAN. Thank you. The Chair now recognizes Ms. Boebert from Colorado for 5 minutes of questioning.

Thank you for being here.

Ms. BOEBERT. Yes. Thank you so much, Madam Chair. We like to brag on some of the ESA resounding successes all the time here in this Committee. For instance, the gray wolf that is fully and completely recovered and should be federally delisted from the Endangered Species Act. So that is truly a success story that should be championed by both sides of the aisle here. But as we have seen, the ESA has been exploited by the Federal Government and radical environmental organizations to stifle development and hinder species recovery.

With the help of the Trump administration, both in his first term and now here, I am looking forward to even more help. We are working to ensure that the Federal agencies are held accountable for their regulatory overreach and reform so that these statutes are implemented as Congress intended. Unfortunately, Congress has not followed these success stories of the ESA enough, and so there has been some actions taken in the Administration.

Mr. Moore, do you know the cost of the delays to natural gas projects the implementation of the ESA has passed on to the American people over 30 years?

Mr. MOORE. Across the industry I don't. I do on a project by project basis for those that I have worked on.

Just giving you——

Ms. BOEBERT. I am happy to hear some numbers you know.

Mr. MOORE. I am sorry?

Ms. BOEBERT. I am happy to hear some numbers you know.

Mr. MOORE. Yes. I mean, to give you one example for a project that I worked on the Mid-Atlantic for an oil and gas pipeline project, there was, as a result of numerous challenges to the Section 7 consultation, it resulted in the project going from $3.5 billion to just over $7 billion.

Ms. BOEBERT. Wow.

Mr. MOORE. One project.

Ms. BOEBERT. Wow. That is incredible. And I have here the Endangered Species Act has caused, obviously, numerous delays to natural gas projects in the U.S., and that we have an estimated cost to the economy of $261 to $979 million over the past 30 years. So, your one project certainly has a much more detail than that.

Mr. Moore, how do you believe that President Trump's emergency energy declaration would reduce costly delays like this?

Mr. MOORE. I think that any streamlining measure is going to certainly make the process run more smoothly. Anything that will lift the unnecessary delays that are faced is going to not only make the process run better and how it was intended to run, but it also will free up the resources of the agencies.

As it is right now, they are facing a constant barrage of lawsuits from project opponents that really hamstring them, and they are not in a position to be able to do the work that they were tasked with doing by Congress. That causes them to then have to reallocate the resources to other projects. So anything that streamlines the process and makes it run in an efficient manner is going to have benefits across not only the regulated community, but also within the government.

Ms. BOEBERT. Yes, thank you. Streamlining does certainly save money and makes things more efficient.

Mr. Vecchione, is that——

Mr. VECCHIONE. That is fine.

Ms. BOEBERT. OK. Would you agree that the purpose of the ESA to remove species from the list of endangered and threatened species once the species has recovered is the right path to take?

Mr. VECCHIONE. Yes.

Ms. BOEBERT. Yes, so I think especially impacting our farmers and ranchers in my home State of Colorado with the judicial fiat that has resulted in the gray wolf continuing to be delisted, the science is crystal clear on this, the gray wolf should no longer be on the list. It is completely recovered. At over 6,000 wolves at the time of the first delisting, the gray wolf has been the latest Endangered Species Act success story that we have been focused on here.

Now, how have State and tribal management plans helped to bring back species like the gray wolf to be fully recovered?

And how does keeping them on the list disenfranchise these partnerships?

Mr. VECCHIONE. I don't know.

Ms. BOEBERT. OK, great. Well, I think that working with our tribal lands certainly does help with this partnership and they are even willing to enact their Brunot treaty to prevent the gray wolves from being introduced onto their sovereign land.

So thank you for our witnesses who are here today, and have a great day.

Ms. HAGEMAN. Thank you.

I ask for unanimous consent to enter into the hearing record four letters received by the Committee: a letter from the EnerGeo Alliance, which highlights challenges with the implementation of the MMPA and ESA, and how reforms could provide greater certainty to the American energy sector; a letter from the California Sea Urchin Commission; a letter from the California Pelagic Fisheries Association; and a letter from the Mystic Aquarium in Connecticut.

Without objection, so ordered.

[The information follows:]

EnerGeo Alliance
Houston, Texas

February 26, 2025

Hon. Harriet Hageman, Chairman
House Natural Resources Committee
Subcommittee on Water, Wildlife and Fisheries
1324 Longworth House Office Building
Washington, DC 20515

Re: Oversight Hearing, "Evaluating the Implementation of the Marine Mammal Protection Act and the Endangered Species Act"

Dear Chair Hageman:

EnerGeo Alliance applauds your efforts to provide oversight on the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA), early in the 119th Congress. It is imperative that the legislative branch provide oversight and consider modernizing legislation on a regular interval, unfortunately, for both the MMPA and ESA this has not been the case. We urge careful review of these outdated statutes and swift adoption of provisions to modernize the laws.

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

When it was enacted in the early 1970s (and subsequently amended), the congressional intent behind the MMPA was forward-thinking and appropriate for the time and identified problems. However, decades of regulation and litigation have exposed some significant flaws in the MMPA. Fixing these flaws would increase regulatory efficiency, decrease uncertainty and federal government costs, and ultimately benefit all stakeholders and the implementing agencies.

The primary flaws stem from poorly written statutory language that creates (1) ambiguity and uncertainty in the application of the MMPA's legal standards, and (2) procedural inefficiency. Fixing some of the most obvious flaws in the MMPA could result in tangible regulatory benefits. Our letter addresses some of the key problematic areas and we look forward to working with you to ameliorate those issues.

Geoscience surveying has been and continues to be essential to achieving the Outer Continental Shelf Lands Act's (OCSLA's) requirements because it is the only feasible technology available to accurately image the subsurface of the OCS before a single well is drilled or a single energy source is developed.

Offshore geoscience surveys require authorizations from the Bureau of Ocean Energy Management (BOEM), pursuant to OCSLA. *See id*. § 1340. There is no requirement for an applicant for an offshore survey permit under OCSLA to obtain an incidental take authorization under the MMPA. However, unlawful "takes" of marine mammals incidental to lawful activities (such as a permitted offshore seismic survey) may nevertheless be subject to MMPA-based penalties. *See* 16 U.S.C. § 1375. Accordingly, many applicants for offshore survey permits from BOEM also request incidental (i.e., unintentional) take authorization under the MMPA from the National Marine Fisheries Service (NMFS) and/or the U.S. Fish and Wildlife Service (FWS).[1]

In this context, it is important to recognize that the permit issued by BOEM authorizes the *seismic survey* and the MMPA authorization narrowly addresses the *incidental take* associated with the seismic survey. NMFS and FWS do not have jurisdiction over the survey; their authority under the MMPA extends only to the authorization of incidental take. Notwithstanding the limited role of FWS and NMFS, MMPA authorizations are **often the primary cause of administrative delay** in the offshore geoscience survey permitting process.

[1] FWS has jurisdiction over polar bears, walrus, sea otters, dugongs, and manatees. NMFS has jurisdiction over all other marine mammals.

In the past decade, these problems have manifested in routinely delayed permitting processes, inconsistent and misguided analyses of potential impacts, and opportunistic advocacy litigation intended to block or impede offshore development.

For example, in the Gulf of America, BOEM requires an MMPA authorization from NMFS prior to the issuance of a geoscience permit under the current Incidental Take Regulation (ITR). During the rulemaking process, industry pointed out mathematical errors in the ITR that was originally promulgated January 2021. As discussed further below, it took BOEM and NMFS an additional three years to re-evaluate the original analysis before NMFS amended the ITR in 2024, ultimately making few changes. This revision process was just one of many delays in the history of the Gulf ITR that contributed to the steady decline of geoscience surveys mapping the Gulf of America since at least 2014.

In Alaska, unnecessary and unexplained delays in processing MMPA authorizations prevent planned geoscience surveys from providing the timely insight that would update resource estimates. Currently, at least one petition for MMPA authorization has stalled for more than two years preventing updated insight into the resource potential on Alaska's North Slope.

In the Atlantic, approximately 40 years have passed since the potential hydrocarbon resource base has been assessed with seismic surveys. In the meantime, seismic surveys for "scientific research" have been conducted fairly regularly in the Atlantic OCS, in addition to other geophysical surveys used to characterize the seabed and subsurface for suitability of offshore wind energy facilities. Six companies applied to BOEM for permits to conduct seismic surveying in the Atlantic OCS—a process that started in 2011, when the first permit application was filed, and ultimately ended in 2018 after nearly six years of working to obtain MMPA authorizations from NMFS.

Problematic MMPA provisions that provide negligible added protection for marine mammals:

- To issue an incidental take authorization under Section 101(a)(5) of the MMPA, the agency must show that the authorization will have no more than a negligible impact on marine mammal populations and result in only small numbers of incidentally taken animals. "Negligible impact" is not clearly defined; (2) "small numbers" is not defined at all; and (3) there is significant overlap between these two ambiguous standards. These problems have led to regulatory uncertainty, inconsistent application by agencies, and much litigation.
- To issue an incidental take authorization, the agency must require "other means of effecting the least practicable impact." These "other means" typically take the form of mitigation measures included as conditions of the authorization. "Least practicable impact" is not defined in the statute or in the implementing regulations. As a result, it is not consistently applied by agencies, there is very little guidance for the regulated community, and, most recently, the phrase has been unreasonably interpreted by the Ninth Circuit Court of Appeals.
- The MMPA permits the authorization of incidental take by harassment. The definition of "harassment" is overly broad and ambiguous, and confusingly refers to "potential" harassment rather than actual harassment. This results in serious problems in the estimation of incidental take and unrealistic assumptions made by the implementing agencies.
- The process for issuing incidental take authorizations is routinely delayed by the implementing agencies. The current procedural requirements create little accountability for agencies because they are either ambiguous or establish no consequences or solutions for unreasonably delayed agency action.
- The MMPA creates a 5-year limit on "incidental take regulations" that requires applicants to petition for a new set of regulations every 5 years. This results in unnecessary and burdensome administrative processes that create frequent opportunities for litigation.
- Issues involving the overlap of the MMPA, the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA) have proven difficult for the agencies, the courts, and the regulated community. Because the MMPA sets the most rigorous conservation-oriented standards of all these statutes, additional reviews and administrative processes under the ESA and NEPA are often unnecessary and redundant.

The energy geoscience industry is in the business of minimizing the footprint of energy activity by pinpointing where the resource is and importantly where it is not.

Armed with reliable data and analysis, companies and policymakers are able to identify and prioritize high-density, low-carbon-intensive energy sources closer to existing infrastructure and the end user, locating where offshore wind facilities are best suited for harnessing the energy from wind, prolonging the life of existing natural gas and petroleum assets, and making it possible to store carbon beneath the surface. Geoscience surveys provide the information governments and policymakers need to make informed decisions in the best interest of their citizens regarding accessing mainstay energy and alternative sources, as well as developing low-carbon strategies. Currently, those data acquired by our members make it possible for BOEM to publish resource assessments. Nations cannot develop and provide opportunities for energizing their economies without the geoscience industry, let alone implement their energy evolution goals to make reliable, affordable energy available to their citizens and meet Net Zero Emissions (NZE) policy ambitions.

We strongly support efforts to modernize the MMPA, which will help to ensure more rigorous and comprehensive assessments of U.S. energy supplies and a more efficient and predictable process for permitting geoscience surveys. The energy geoscience and exploration industry stands ready to partner in the discovery and development of energy dense, low emissions sources of energy to power the world. Streamlining the permitting process along with reducing the ability for outside special interest groups to obstruct energy geoscience exploration is a necessary step to ensure our continued development of energy resources and low-carbon solutions for future generations in the U.S. We appreciate your focus on these important matters to enhance the country's energy development through common-sense modernization of the MMPA and ESA

Sincerely,

DUSTIN VAN LIEW,
Vice President, Global Policy & Government Affairs

California Sea Urchin Commission
Folsum, CA

February 24, 2025

Hon. Harriet Hageman, Chairman
House Natural Resources Committee
Subcommittee on Water, Wildlife and Fisheries
1324 Longworth House Office Building
Washington, DC 20515

Dear Chair Hageman:

We are writing to express our views on the important work the Subcommittee is conducting on February 26, 2025 to evaluate the Implementation of the Marine Mammal Protection Act and the Endangered Species Act.

The California Sea Urchin Commission (CSUC), a State Agency Marketing Program represents California sea urchin divers and processors. Our industry operates in State waters, but has been systematically harmed by the indiscriminate actions taken by the Federal Bureaucrats in the U.S. Fish & Wildlife Service (USFWS).

In 1986 we agreed to forfeit prime fishing grounds to support the recovery of the threatened sea otter and, worked out a plan with the USFWS to establish a new colony of sea otters at San Nicolas Island. That agreement was codified in P.L. 99-625. The USFWS reneged on every aspect of the agreement including placing significantly fewer animals on the Island, without adjusting the success/failure criteria. If it was deemed a failure the Service agreed they would remove all the animals and place them back to their original colony. They also promised to constrain strays. In return the USFWS provided relief from incidental take and agreed to consult with the National Marine Fisheries Service (NMFS) regarding other Endangered Species such as Abalone in the No Otter Zone. The USFWS eventually declared the translocation a failure even though some there was some population growth, but failed to acknowledge the impact of moving fewer animals than proposed. The Service decided to leave the animals in place even though the agreement was to move them back. The USFWS acknowledged that leaving the sea otters at San Nicolas Island would result in range expansion and cause additional lost fishing

opportunities. The Service never consulted with the NMFS regarding endangered Abalone or other species. By terminating P.L. 99-625 the Service exposed the sea urchin and other fisheries to incidental take provisions of the MMPA. The CSUC sued the Service which ultimately led us to the U.S. Supreme Court in 2018 with the underlying premise that the Service knew better and changed the rules as they saw fit. We brought up the Chevron Deference clause as the basis for the Service's actions. The Supreme Court did not take our case. They did eventually decide a case by striking down the Chevron Deference. Unfortunately, the 2024 Supreme Court Ruling Loper Bright Enterprises v. Raimondo precludes us from seeking relief.

In 2020 the CSUC petitioned the USFWS to delist the Southern Sea Otter as a threatened species due to their increasing population. Once again the USFWS used their discretion to deny the petition by continually changing the minimum population numbers, citing a lack of genetic diversity and claiming they needed to update their Recovery Plan.

In June 2022, a USFWS report, Feasibility Assessment: Sea Otter Reintroduction to the Pacific Coast, was released in response to a largely-unvetted Congressional mandate. In this report, the Agency lays out the potential benefits of reintroducing sea otters to new areas of the West Coast and identifies some—but not all—significant areas of concern. For Southern Oregon and Northern California coastal communities dependent on Dungeness crab, sea urchin, and other shellfish, reintroducing sea otters in an area where they have been absent for more than 100 years will spell big trouble. Our ports, our charter, sport and commercial fisheries, our livelihoods depend on robust fisheries management by State and Federal Agencies. Introducing sea otters, especially as they would be protected under the Endangered Species and Marine Mammal Protection Acts, creates another layer of fisheries management problems. The USFWS only response to our concerns was to offer to "buy us out." This is totally unacceptable.

Lastly, the USFWS indiscriminately decided to regulate sea urchin imports and exports even though Congress expressly exempted seafood and shellfish products. The Service wrongly interprets sea urchin econoderms used for human consumption as exempted from Congress' intentions. Sea Urchin processors must obtain a federal import/export license, submit to inspections after providing 48 hours of notice to USFWS, and pay fees that can cost hundreds of dollars per shipment. Very often the USFWS are late to the inspections and cause serious economic losses due to the highly perishable nature of these products.

The CSUC stands ready to assist your Subcommittee's efforts to review and find recommendations on how to improve implementation of the Marine Mammal Protection Act and the Endangered Species Act.

Sincerely,

DAVID GOLDENBERG,
Executive Director

California Pelagic Fisheries Association
San Diego, CA

February 22, 2025

Hon. Harriet Hageman, Chairman
House Natural Resources Committee
Subcommittee on Water, Wildlife and Fisheries
1324 Longworth House Office Building
Washington, DC 20515

Re: Evaluating the Implementation of the Marine Mammal Protection Act and the Endangered Species Act

Dear Chair Hageman and subcommittee members:

The California Pelagic Fisheries Association (CPFA) is a San Diego-based organization representing U.S. fishermen targeting wild, highly migratory fish species (HMS) from the offshore waters of California. We are using this opportunity to express our views on the regulatory aspects of the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA).

Over the years, our members have become further restricted in their ability to harvest the healthy, HMS stocks such as the swordfish, bigeye tuna, and Pacific bluefin tuna found between the U.S. West Coast and Hawaii. These restrictions result from regulations imposed by the Department of Interior's Fish and Wildlife Service and the Department of Commerce's National Marine Fisheries Service under both the MMPA and the ESA. We argue that the regulatory interpretations of the two agencies fail to consider indirect effects created elsewhere from their actions. Consequently, unaccountable regulations severely hamper our members' ability to provide fresh seafood to U.S. consumers and contribute to U.S. food security.

The regulations adopted by the agencies overlook that the Nation consumes mostly imported seafood. Based on the source used, the USA imports somewhere between 62–68[1] to 90 percent[2] of the seafood it consumes. The ability to close that gap and reduce dependence on foreign fishing sources will require policymakers understanding that excessive restrictions on U.S. fishermen only transfer these impacts to foreign fisheries operating under less stringent conservation requirements than those imposed on U.S. harvesters. In other words, the unintended displacement of ecosystem impacts curtailed by shortsighted regulations results in reduced supply to the USA, shifts production to other less regulated areas, and adds another factor affecting the Nation's seafood trade deficit.

We urge the subcommittee to consider our comments in its deliberations and to revisit the intentions of both statutes in the light of U.S. food security. Protections for living marine resources need to shift from a unilateral marine conservation perspective to one that recognizes and accounts for distant ecological consequences.

Sincerely,

DAVE RUDIE,
President

Mystic Aquarium
Mystic, CT

Hon. Harriet Hageman, Chairman
House Natural Resources Committee
Subcommittee on Water, Wildlife and Fisheries
1324 Longworth House Office Building
Washington, DC 20515

Dear Chairwoman Hageman:

Mystic Aquarium appreciates your subcommittee's evaluation of the implementation of the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). Mystic Aquarium, located in historic Mystic Connecticut, is home to thousands of species of marine mammals, fish, invertebrates, and reptiles. Additionally, Mystic Aquarium holds the sole letter of authorization from the National Marine Fisheries Service for the response, rescue, and rehabilitation of federally protected stranded marine mammals and sea turtles in Connecticut, Rhode Island, and Fisher's Island, New York, over 1,000 miles of coastline, and operates an Animal Rescue Clinic (ARC) that allows sick, entangled or otherwise injured marine mammals and sea turtles to be rehabilitated and returned to their ocean environment.

The health and welfare of the animals at Mystic Aquarium is always our top priority. From the advanced environmental and water quality systems to diagnostic services that can detect dangerous pathogens in marine animals to our animal care and rescue efforts, our focus remains on advancing the well-being of aquatic animals and their environments. Every day, our researchers, veterinary team, animal rescue staff, and citizen scientists are learning more about how to protect our ocean and are putting the lessons learned into practice.

Mystic Aquarium is, at its foundation, a research, conservation, and education institution. We are a leader in marine and environmental research, addressing critical challenges to Connecticut's marine ecosystems, biodiversity, and climate. The

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[1] Gephart, J.A., Froehlich, H.E. and Branch, T.A. 2019. *Opinion: To create sustainable seafood industries, the United States needs a better accounting of imports and exports*. Proceedings of the National Academy of Sciences, 116: 9142-9146.

[2] Helvey, M., Pomeroy, C., Pradhan, N.C., Squires, D. and Stohs, S. 2017. *Can the United States have its fish and eat it too?* Marine Policy, 75: 62-67.

Aquarium's scientific expertise is key to advancing knowledge and finding solutions to pressing environmental issues. Expanding its research capabilities is vital to keeping Connecticut at the forefront of scientific inquiry and addressing emerging challenges.

Mystic Aquarium Conducts Science in three ways:

- The Aquarium's living collection of marine mammals allows for studies under controlled conditions (known environmental, diet, and health parameters), training of the animals for biological samples, and experimental non-invasive research studies designed to answer relevant questions to their care and management in aquaria and in the wild.
- The Aquarium's Animal Rescue Program allows for sampling of wild animals upon admit through rehabilitation and release to understand their biology and health.
- Through collaborations, fieldwork is conducted on wild counterparts in their natural environment.

To maintain and strengthen our capability to engage in essential research for the benefit of the species in our care, it is essential to enhance policies that support Mystic Aquarium's research capacity. Among our most pressing policy concerns are those that challenge our capability to maintain a healthy population of the various marine mammals in our collection. While collecting marine mammals from the wild population is rightly prohibited, the only means by which aquariums such as Mystic can maintain a population of marine mammals such as seals is through reproduction among the animals in our care. Maintenance of rescued animals that cannot, for medical reasons be returned to the wild does not provide a path to sustaining populations in human care over time, if the permit authorizing the maintenance and care for the rescued animal requires contraception

Unfortunately, permits issued by the National Marine Fisheries Service (including sub-permits and letters of authority) often requires the caretakers to give contraceptive drugs to the animal or separate animals by gender. This is despite lack of a statutory foundation on which to base these restrictions.[1]

We urge your subcommittee to ensure through your oversight activities that permit conditions should not be add-ons to restrictions in the MMPA, but instead should simply implement the restrictions authorized in statute.

Sincerely,

SUSETTE TIBUS,
CEO

Ms. HAGEMAN. I again 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 those in writing. Under Committee Rule 3, members of the Committee must submit questions to the Subcommittee Clerk by 5 p.m. Eastern on Monday, March 3. The hearing record will be held open for 10 business days for those responses.

Without objection, the Subcommittee stands adjourned.

[Whereupon, at 12:46 p.m., the Subcommittee was adjourned.]

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[1] 16 U.S.C. § 1374 governs MMPA permits. It has no provision authorizing NMFS to condition the issuance of permits on the animal being subjected to contraception. To the contrary, the statute anticipates that reproduction of animals covered by a permit will occur, as it provides that no additional permits or authorizations are necessary to care for the "progeny" of the animal covered by the permit. § 1374(c)(8)(A) ("No additional permit or authorization shall be required to possess [or undertake other actions regarding] the progeny of marine mammals taken [such as by rescue of a stranded animal] or imported" under a permit, if the progeny participate in public display, research, or other appropriate conservation activities). Some marine mammals are subject to both the MMPA and ESA. The ESA permit provision, 16 U.S.C. § 1539, authorizes the agency to impose permit conditions, but does not mention contraception, and does not displace the MMPA permit provision's more specific discussion of marine mammal "progeny." 16 U.S.C. § 1539. Another MMPA section authorizes NMFS to issue contracts to rescue stranded animals, but also does not mention contraception 16 U.S.C. §§ 1379(h)(1), 1421b(a).

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

Submissions for the Record by Rep. Hageman

National Marine Manufacturers Association
Washington, DC

March 5, 2025

Hon. Harriet Hageman, Chairman
House Natural Resources Committee
Subcommittee on Water, Wildlife and Fisheries
1324 Longworth House Office Building
Washington, DC 20515

Re: Oversight Hearing on "Evaluating the Implementation of the Marine Mammal Protection Act and the Endangered Species Act"

Dear Chair Hageman:

I write on behalf of the National Marine Manufacturers Association (NMMA) to express support for the need to carefully reform the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). NMMA appreciates the Subcommittee's dedication to evaluating this important issue and considering opportunities to improve the implementation of these critical programs to ensure federal decisions are supported by an objective consideration of both the best available scientific evidence and the full scope of a decision's potential impacts. NMMA appreciates the recent hearing on these matters featuring witnesses with strong legal expertise and practical knowledge related to implementing these laws in the modern era. I request submission of this letter to the hearing record to share the recreational marine industry's perspective.

Congress enacted the MMPA and the ESA in the 1970s with the goal of conserving and protecting marine mammals and other endangered species. Since its enactment, there have only been slight adjustments to the laws, but none of the changes have accounted for the dramatic changes over the last half-century with the increased ability to access our treasured marine resources and technological advancements on the vessels used to access these spaces. Given recent activities from the federal entities responsible for managing public resources and several ill-conceived proposed restrictions and rules that could significantly harm public access, small businesses and the American economy, a review of the congressional intent and commonsense reforms to this 50-year-old law is warranted.

NMMA and its members fully support these statutes and the objectives of conservation and species protection. However, too often federal agencies responsible for implementing the MMPA and ESA have failed to give a balanced review of the scientific data, and instead have relied on incomplete information and flawed modeling that intentionally overestimate the risk to a species from a particular activity. This approach is often referred to as "giving the benefit of the doubt to the species." This is not sound science and does not reflect reasoned decision-making or result in greater protection of marine mammals and identified species. Unfortunately, the ultimate outcome is needless bureaucratic red-tape and regulatory overreach that often ignores significant negative impacts to the economy and everyday Americans.

The North Atlantic right whale vessel strike reduction rule (VSR) is just one example of this regulatory overreach. The National Marine Fisheries Services (NMFS) promulgated the VSR in 2008, establishing a 10-knot speed limit for most vessels equal to or greater than 65 feet in length in certain limited geographic areas along the Atlantic Seaboard. The stated purpose of the rule was to reduce the likelihood of death or injury of right whales due to vessel collisions. At that time, the 2008 rule was intended to be temporary. NMFS, however, made the rule permanent in 2013 and, in 2022, proposed to dramatically expand the vessel speed requirements to (1) smaller vessels between 35 and 65 feet in length; and (2) a vastly expanded area encompassing nearly the entire Atlantic Seaboard for eight months of the year.

The proposal received broad condemnation from states, local governments, and the marine industries, including NMMA and the recreational boating industry. NMFS's justification for rule was based on flawed data and unrealistic modeling, reflecting a "worst case" analysis of risks to the species from smaller vessels and a skewed projection of efficacy. Further, the Agency had crafted the proposal

without any prior engagement of the industries most impacted by the rules, causing it to overlook the significant safety, operational, economic, and privacy consequences of the rule. The result: an overly stringent regulation with little actual benefit to right whales and significant detrimental harm to boaters and coastal economies up and down the East Coast.

Fortunately, the Biden Administration withdrew the ill-advised proposal in January of this year. But it stands as a stark example of the immediate need for MMPA and ESA reform. Changes must be undertaken to ensure that, when implementing the MMPA and ESA, NMFS and other federal agencies are required to (1) involve all stakeholders prior to development of rules, including states, local governments, and impacted industries; (2) undertake and objective and neutral view of the best science and data available; and (3) consider all direct and indirect socio-economic impacts of an action.

NMMA appreciates the Subcommittee for its ongoing commitment to address this critical issue that impacts all Americans and their communities. We welcome the opportunity to work together to ensure that the intent of the statutes are clarified and implemented in a manner that both protects sensitive species and supports public access and economic activity.

Sincerely,

FRANK HUGELMEYER,
President and Chief Executive Officer