Testimony of Professor Daniel J. Rohlf
Oversight Hearing before the Committee on Natural Resources,
Water, Wildlife, and Fisheries Subcommittee

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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 generations 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 benefitting 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.

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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.

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 remarkably 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

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[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.

[4] *Id*. at 6.

[5] KIERÁN 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.

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 administration 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

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[8] *Id.*

[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.

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.

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

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 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.

[11] 16 U.S.C. § 1533(b)(1)(A).

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, benefitting 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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[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.