



HOUSE COMMITTEE ON  
**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](mailto:annick.miller@mail.house.gov)), Doug Levine ([doug.levine@mail.house.gov](mailto:doug.levine@mail.house.gov)), Kirby Struhar ([kirby.struhar@mail.house.gov](mailto:kirby.struhar@mail.house.gov)), and Thomas Shipman ([thomas.shipman@mail.house.gov](mailto: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*”

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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 10:00 a.m. (EST) in 1324 Longworth House Office Building.**

Member offices are requested to notify Lindsay Walton ([lindsay.walton@mail.house.gov](mailto: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.<sup>1</sup> *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.<sup>2</sup> Accordingly, in its decision, the Court directed federal courts to exercise independent judgment to determine how to interpret federal statutes.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> *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.<sup>6</sup>



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.<sup>7</sup> 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

<sup>1</sup> Decision No. 22-451. U.S. Supreme Court. [22-451 Loper Bright Enterprises v. Raimondo \(06/28/2024\)](#)

<sup>2</sup> [5 U.S.C. 706](#)

<sup>3</sup> Decision No. 22-451. U.S. Supreme Court. [22-451 Loper Bright Enterprises v. Raimondo \(06/28/2024\)](#)

<sup>4</sup> [16 U.S.C. 1881b](#)

<sup>5</sup> [85 FR 7414](#)

<sup>6</sup> 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](#)

<sup>7</sup> 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](#)

accountable to the President and to Congress, so they have more claim to make policy than courts do.<sup>8</sup>

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.<sup>9</sup>

### 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.<sup>10</sup>

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.<sup>11</sup>

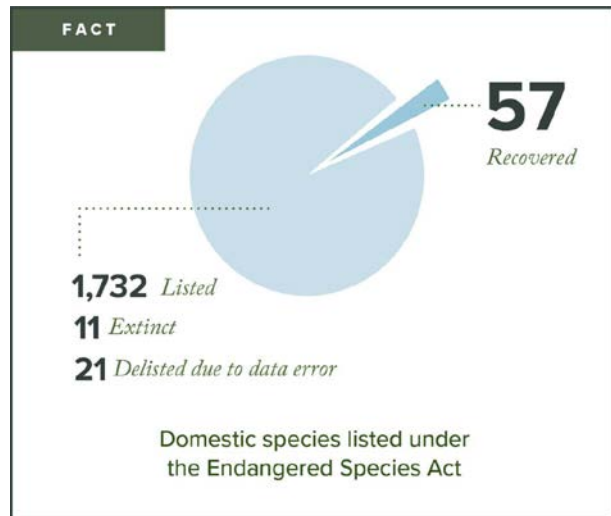


Figure 2 Graph on the number of listed species that have been recovered | Source: PERC

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

<sup>8</sup> [R48320](#)

<sup>9</sup> [R48320](#)

<sup>10</sup> Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.

<sup>11</sup> *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112<sup>th</sup> Cong. (2011) ([testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 10](#)).

<sup>12</sup> Public Law 100-478, the Endangered Species Act Amendment of 1988. <https://www.congress.gov/100/STATUTE-102/STATUTE-102-Pg2306.pdf>

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.<sup>13</sup> 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.”<sup>14</sup> 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.”<sup>15</sup> 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.<sup>16</sup>



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.”<sup>17</sup>

Litigation and threats of litigation on both substantive and procedural grounds have significantly increased, upending the listing and delisting process under the ESA.<sup>18</sup> 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.<sup>19</sup>

### ***Actions taken by the Committee on Natural Resources***

During the 118<sup>th</sup> 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.

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<sup>13</sup> *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112<sup>th</sup> Cong. (2011) ([testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 10](#)).

<sup>14</sup> 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.

<sup>15</sup> “ESA Basics: 50 Years of Conserving Endangered Species.” U.S. Fish and Wildlife Service. 2/1/23. [Endangered Species Act Basics \(fws.gov\)](#)

<sup>16</sup> 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 \(nas-national-prod.s3.amazonaws.com\)](#)

<sup>17</sup> Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.

<sup>18</sup> “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/>

<sup>19</sup> Endangered Species Act Congressional Working Group. “Report, Findings, and Recommendations.” <https://www.endangeredspecieslawandpolicy.com/assets/htmldocuments/blog/4/2014/10/finalreportandrecommendations-113.pdf>

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.”<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> E.O. 14156 requires the ESA Committee to meet quarterly to review any Section 7 exemption applications it has received.<sup>24</sup> If it has not received any applications, it

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<sup>20</sup> [E.O. 14156](#)

<sup>21</sup> *Id.*

<sup>22</sup> [16 U.S.C. 1536](#)

<sup>23</sup> *Id.*

<sup>24</sup> [E.O. 14156](#)



“shall convene to identify obstacles to domestic energy infrastructure specifically deriving from implementation of the ESA or the Marine Mammal Protection Act.”<sup>25</sup>

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.<sup>26</sup> 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.”<sup>27</sup> 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.<sup>28</sup>



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.”<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> This authority places the same ESA protections on threatened species as there are for endangered species unless

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<sup>25</sup> *Id.*

<sup>26</sup> [16 U.S.C. 1536](#)

<sup>27</sup> [E.O. 14181](#)

<sup>28</sup> *Id.*

<sup>29</sup> [S.O. 3418](#)

<sup>30</sup> *Id.*

<sup>31</sup> [89 FR 23919](#)

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.<sup>32</sup>

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.<sup>33</sup> 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.”<sup>34</sup> 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.

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).<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> This is all despite Idaho, Montana, and Wyoming

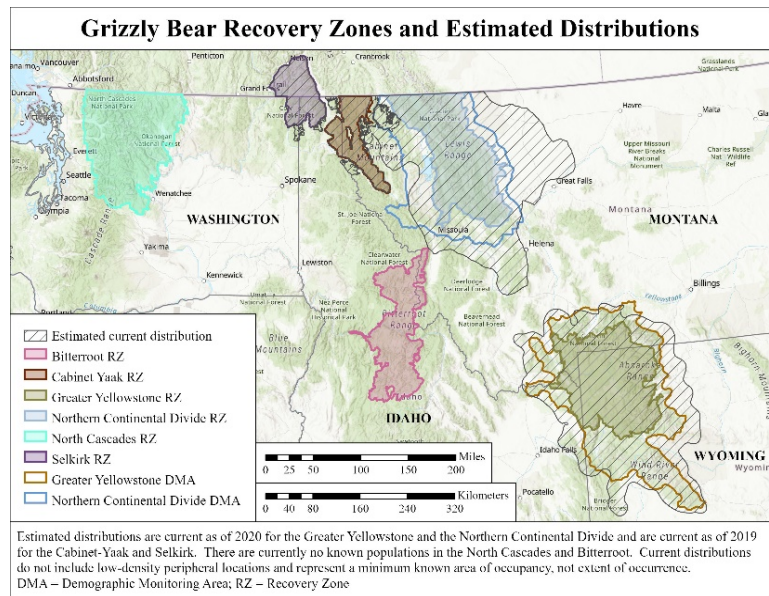


Figure 5 Map of grizzly bear recovery zones. | Source: USFWS

<sup>32</sup> [89 FR 24300](#)

<sup>33</sup> [89 FR 24268](#)

<sup>34</sup> *Id.*

<sup>35</sup> [90 FR 3763](#) and [90 FR 3783](#)

<sup>36</sup> [90 FR 4234](#)

<sup>37</sup> *Id.*

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.<sup>38</sup>

## 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.”<sup>39</sup> 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).<sup>40</sup> 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.”<sup>41</sup>

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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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,”<sup>45</sup> 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.”<sup>46</sup>

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;”<sup>47</sup>

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<sup>38</sup> “2023 Annual Report.” Grizzly Bear Recovery Program. U.S. Fish and Wildlife Service. December 11, 2024. [Grizzly Bear Recovery Program 2023 Annual Report](#)

<sup>39</sup> Congressional Research Service, The Marine Mammal Protection Act (P.L. 92 -522): Primer and Issues for Congress, January 2024. <https://sgp.fas.org/crs/misc/R47892.pdf>

<sup>40</sup> P.L. 922-522, the Marine Mammal Protection Act. <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf>

<sup>41</sup> *Id.*

<sup>42</sup> NOAA Fisheries, John H. Prescott Marine Mammal Rescue Assistance Grant Program. Last updated on January 23, 2025. <https://www.fisheries.noaa.gov/grant/john-h-prescott-marine-mammal-rescue-assistance-grant-program>

<sup>43</sup> P.L. 115-329. Endangered Salmon Predation Prevention Act. December 18, 2018. <https://www.congress.gov/115/statute/STATUTE-132/STATUTE-132-Pg4475.pdf>

<sup>44</sup> NOAA Fisheries. Laws & Policies: Marine Mammal Protection Act. <https://www.fisheries.noaa.gov/topic/laws-policies/marine-mammal-protection-act>

<sup>45</sup> P.L. 922-522, the Marine Mammal Protection Act. Sec. 3(18)(A)(i) <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf>

<sup>46</sup> P.L. 922-522, the Marine Mammal Protection Act. Sec. 3(18)(A)(ii) <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf>

<sup>47</sup> P.L. 922-522, the Marine Mammal Protection Act. Sec. 117. <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf>



created a program to prevent incidental take of marine mammals for commercial fishing;<sup>48</sup> developed exceptions on the take moratorium for marine mammals;<sup>49</sup> and directed the study of how specific mammals like sea lions and seals impact the nation's federal fisheries.<sup>50</sup>

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.<sup>51</sup> 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.”<sup>52</sup> 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.

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<sup>48</sup> NOAA Fisheries. Laws & Policies: Marine Mammal Protection Act. <https://www.fisheries.noaa.gov/topic/laws-policies/marine-mammal-protection-act>

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> P.L. 922-522, the Marine Mammal Protection Act. Sec. 101. <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf>

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

Type of Authorization	Authorized Activities	Federal Agency	Citations
<b>Incidental Takes</b>			
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.
<b>Directed Takes</b>			
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.<sup>53</sup> Since October 2008, NOAA has had a 10-knot speed restriction for vessels 65 feet and longer.<sup>54</sup> While this rule has made progress in preventing vessel strikes and protecting marine mammals,<sup>55</sup> NOAA has experienced challenges in ensuring

<sup>53</sup> National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS). Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule. Proposed Rule. August 1, 2022.

<https://www.govinfo.gov/content/pkg/FR-2022-08-01/pdf/2022-16211.pdf>

<sup>54</sup> 2008 Final Rule. “Endangered Fish and Wildlife; Final Rule To Implement Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales.” October 10, 2008. <https://www.govinfo.gov/content/pkg/FR-2008-10-10/pdf/E8-24177.pdf>

<sup>55</sup> National Marine Fisheries Service Office of Protected Resources. North Atlantic Right Whale (*Eubalaena glacialis*). Vessel Speed Rule Assessment. June 2020. [https://media.fisheries.noaa.gov/2021-01/FINAL\\_NARW\\_Vessel\\_Speed\\_Rule\\_Report\\_Jun\\_2020.pdf?null](https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf?null)

compliance with it.<sup>56</sup> Later, in 2022, NOAA released a proposed rule that would have dramatically expanded this speed restriction to vessels as small as 35 feet.<sup>57</sup> In July 2024, a bipartisan coalition of more than 50 members of the House of Representatives 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.<sup>58</sup> After a great deal of pressure, the Biden administration withdrew the rule in January 2025.<sup>59</sup>

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),<sup>60</sup> which is defined as "a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response."<sup>61</sup> In 2017, NOAA declared a UME for the North Atlantic right whale.<sup>62</sup> 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."<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

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."<sup>66</sup> The rule also established a PBR of 0.7 whales for the East Coast.<sup>67</sup>

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<sup>56</sup> Small Business Administration, Office of Advocacy. Comments submitted to NOAA and NMFS regarding "Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule (87 Fed. Reg. 46921)." October 31, 2022. <https://www.regulations.gov/comment/NOAA-NMFS-2022-0022-21126>

<sup>57</sup> National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS). Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule. August 1, 2022.

<sup>58</sup> House Committee on Natural Resources. Members Continue Voicing Concerns Over Devastating NOAA Speed Restriction. July 15, 2024. <https://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=416284>

<sup>59</sup> House Committee on Natural Resources. After Consistent Committee Pressure, NOAA Withdraws Disastrous Speed Rule. January 17, 2025. <https://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=416866>

<sup>60</sup> Section 404. Marine Mammal Protection Act. <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf>

<sup>61</sup> Section 410. Marine Mammal Protection Act. <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf>

<sup>62</sup> National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS). 2017–2025 North Atlantic Right Whale Unusual Mortality Event. Last Updated on January 2, 2025.

<https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2025-north-atlantic-right-whale-unusual-mortality-event>

<sup>63</sup> National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS). Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule. Proposed Rule. August 1, 2022.

<https://www.govinfo.gov/content/pkg/FR-2022-08-01/pdf/2022-16211.pdf>

<sup>64</sup> House Committee on Natural Resources, Subcommittee on Water, Wildlife and Fisheries. Written Testimony of Frank Hugelmeyer. June 6, 2023. [https://naturalresources.house.gov/uploadedfiles/testimony\\_hugelmeyer.pdf](https://naturalresources.house.gov/uploadedfiles/testimony_hugelmeyer.pdf)

<sup>65</sup> E&E News. Atlantic right whale count ticks up—ever so slightly. October 22, 2024.

<https://subscriber.politicopro.com/article/eenews/2024/10/22/atlantic-right-whale-count-ticks-up-ever-so-slightly-00184865>

<sup>66</sup> P.L. 922-522, the Marine Mammal Protection Act. Sec. 3. <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf>

<sup>67</sup> National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS). Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule. Proposed Rule. August 1, 2022.

<https://www.govinfo.gov/content/pkg/FR-2022-08-01/pdf/2022-16211.pdf>

This rule met great opposition from numerous stakeholders operating along the Atlantic Coast and was the subject of Committee oversight.<sup>68</sup> 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 21<sup>st</sup> 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"<sup>69</sup> provided that the Secretary finds that it "will have a negligible impact on such species or stock."<sup>70</sup> 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.

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<sup>68</sup> House Committee on Natural Resources, Subcommittee on Water, Wildlife and Fisheries. Oversight hearing, "*Examining the impacts of the National Oceanic and Atmospheric Administration's proposed changes to the North Atlantic Right Whale Vessel Strike Reduction Rule.*" June 6, 2023. <https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=413367>

<sup>69</sup> P.L. 922-522, the Marine Mammal Protection Act. Sec. 101. <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf>

<sup>70</sup> *Id.*