Testimony

of

ROBERT G. DREHER
SENIOR VICE PRESIDENT OF CONSERVATION PROGRAMS
DEFENDERS OF WILDLIFE

Before the

COMMITTEE ON NATURAL RESOURCES

U.S. HOUSE OF REPRESENTATIVES

on

H.R. 3608, H.R. 6344, H.R. 6345, H.R. 6346, H.R. 6354, H.R. 6355, H.R. 6356, H.R. 6360, and H.R. 6364

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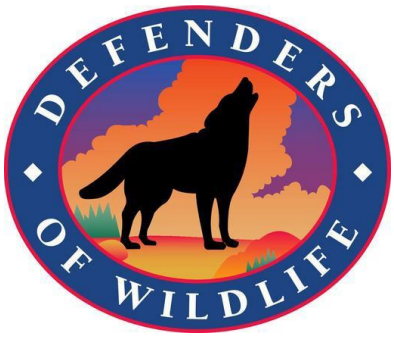

Good morning Chairman Bishop, Ranking Member Grijalva, and Members of the Committee:

My name is Bob Dreher and I am Senior Vice President of Conservation Programs at Defenders of Wildlife (Defenders), a national non-profit conservation organization dedicated to the protection of all native animals and plants in their natural communities. For 70 years, Defenders has protected and restored imperiled species throughout North America by establishing on the ground programs at the state and local level; securing and improving state, national, and international policies that protect species and their habitats; and upholding legal safeguards for native wildlife in the courts. We represent more than 1.8 million members and supporters.

Before joining Defenders in June 2016, I served as Associate Director of the U.S. Fish and Wildlife Service, serving as the primary policy advisor for the Director. Prior to that, I served in the Department of Justice as Principal Deputy Assistant Attorney General and Acting Assistant Attorney General for the Environment and Natural Resources Division, and previously served during the Clinton administration as Deputy General Counsel of the U.S. Environmental Protection Agency. I have spent my career in conservation law, having represented business clients in private practice and conservation organizations as managing attorney for the Washington, D.C. office of the Sierra Club Legal Defense Fund (now Earthjustice). I also taught federal natural resources law as an adjunct professor for almost 20 years at George Washington University Law School and Georgetown University Law Center.

Thank you for inviting me here today to discuss the nine Western Caucus bills related to the Endangered Species Act (ESA) that are before this Committee. I welcome the opportunity to speak about conserving imperiled wildlife under the ESA and the negative impact these bills would have on that important work.

As I will describe in detail, the bills before this Committee today would undermine key provisions of the ESA and result in increased harm to protected species and their habitat. The bills would gut the ESA's science-centered listing process by mandating reliance on any information provided by state and local governments. They would create arbitrary barriers to listing species, including prioritizing delisting species at the expense of species that may face imminent extinction; one bill would even allow states and county governments to effectively veto decisions to list species. Other bills would limit designation of critical habitat, force the government to pay landowners to comply with the ESA, and undermine the rule of law by excluding agency decisions from judicial review. One bill would allow the Secretary to delegate management of endangered species to local governments, corporations or private individuals, undermining both federal and state authorities over wildlife.

Taken together, the Western Caucus bills are a prescription for extinction. Rather than adopt any of these proposals, Congress should reaffirm our national commitment to protecting our biodiversity heritage for current and future generations.

I. The ESA: A Commitment Worth Keeping

Congress passed the ESA in 1973 out of a growing realization that our natural heritage was in peril and needed to be preserved. In section 2 of the law, Congress declared "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation."[1] Congress further recognized that many more species were in danger of extinction and that "these species of fish, wildlife, and plants are

[1] 16 U.S.C. § 1531(a)(1).

of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[2]

With these values in mind, Congress set forth an ambitious goal. The ESA would not only address actions directed at species themselves—such as hunting and trade—but also would "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[3] Congress also pledged to "take such steps as may be appropriate to achieve the purposes of the treaties and conventions" under which our nation had pledged to the world that we would conserve threatened and endangered species.[4]

The commitment we made as a nation in enacting the ESA is embodied in its definition of conservation, which is "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."[5] As the Supreme Court has recognized, the "plain intent of Congress" in enacting the ESA "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the ESA, but in literally every section of the statute."[6] The result is "the most comprehensive legislation for the preservation of endangered species enacted by any nation."[7]

The ESA works by establishing a framework for the conservation of imperiled species, with specific management actions left to the scientific judgment of the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (Services or Service). First, the appropriate Service determines whether a species warrants listing as "threatened" or "endangered."[8] In making this determination, the first factor the Service considers is "the present or threatened destruction, modification, or curtailment of its habitat or range."[9] Consistent with Congress's emphasis on habitat preservation, the Service must also at the time of listing and "to the maximum extent prudent and determinable" designate "any habitat of such species which is then considered to be critical habitat."[10]

Once a species is listed, a series of substantive and procedural requirements attach. While section 9 prohibits "take" of endangered species without prior authorization,[11] section 7(a)(1) imposes on federal agencies a substantive obligation to promote the conservation of listed species.[12] Moreover, section 7(a)(2) obligates federal agencies to consult with the Service whenever they act, authorize, or fund a project that may affect a listed species or its designated critical habitat.[13] Through consultation, federal agencies must ensure that their actions will not "jeopardize the continued existence" of a listed species or "result in the destruction or adverse modification" of critical habitat.[14] This consultation process is

[2] *Id*. § 1531(a)(3).
[3] *Id*. § 1531(b).
[4] *Id*.
[5] *Id*. § 1532(3).
[6] *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).
[7] *Id*. at 180.
[8] 16 U.S.C. § 1533(a)(1).
[9] *Id*. § 1533(a)(1)(A).
[10] *Id*. § 1533(a)(3)(A), (a)(3)(A)(i).
[11] *id*. § 1538(a)(1)(B).
[12] *Id*. § 1536(a)(1).
[13] *Id*. § 1536(a)(2).
[14] *Id*. § 1536(a)(2).

designed to lessen the impact of federal or federally-permitted activities on species and their critical habitats.

Section 7 consultation protects species while allowing most development projects to proceed with no more than minor modifications. Defenders of Wildlife examined every section 7 consultation recorded by the U.S. Fish and Wildlife Service between January 2008 and April 2015, and in that time not one project had been stopped or extensively altered as a result of a finding of jeopardy to a species or adverse modification of critical habitat.[15] Our research proves that consultation does not in theory or practice hamstring private development. To the contrary, it advances the ESA's recovery goals by striking a science-driven balance between conservation and economic activity.

II. The ESA Is A Proven Success

Thanks to the visionary goals and flexible framework Congress established, the ESA is the world's most effective law for protecting wildlife in danger of extinction. A remarkable 99 percent of species have survived since being listed. In its 45-year history only 11 listed species have been officially declared extinct.[16] That in itself is a cause for celebration.

The total number of ESA delistings due to recovery is now 54, with 28 of those overseen by the Obama administration.[17] More recoveries were declared under the Obama administration's watch than all past Administrations combined, not because that administration was necessarily more committed to the ESA than prior administrations but because recovery of species takes time. We have achieved dramatic successes through decades of effort with species like the bald eagle, brown pelican, humpback whale, black-capped vireo, the Louisiana black bear, and the Steller sea lion, all of which have recovered to the point where they no longer require federal protection. But an equal measure of the ESA's success may be the many more species that have been set on a path to recovery, including the iconic grizzly bear, the whooping crane, and the Florida manatee.[18] With adequate resources and commitment, the ESA can save these and other imperiled species.

The ESA has been effective because it requires that decisions under the law be based on the best scientific data available – not politics. It has been improved by continuous administrative reforms that have made the ESA work better both for imperiled species and for stakeholders affected by its provisions. From habitat conservation planning to candidate conservation agreements with assurances that provide regulatory certainty to landowners, the Services have taken advantage of the ESA's inherent flexibility to find win-win solutions. The ESA has also been successful because, like many of our most important environmental and civil rights statutes, it gives individual citizens the right to hold agencies accountable for complying with the law.

Put simply, the ESA works. What is most needed now to improve the ESA's effectiveness is to fully fund it. To clear the backlog of species that require listing decisions, develop recovery plans, and work with stakeholders to promote conservation, the Services must have the necessary resources to achieve the

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[15] Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About A Controversial Provision of the U.S. Endangered Species Act*, 112 PNAS 15844, 15848 (2015), https://defenders.org/publications/section-7-pnas.pdf.
[16] U.S. Fish & Wildlife Serv., Delisted Species, https://ecos.fws.gov/ecp0/reports/delisting-report.
[17] *Id*.
[18] Daniel M. Evans et al., *Species Recovery in the United States: Increasing the Effectiveness of the Endangered Species Act*, Issues in Ecology, Winter 2016, at 1.

ESA's visionary purposes and goals. Rather than change the structure of this successful law, Congress should provide the funding necessary for the ESA to realize its full potential.

Given its visionary purpose and numerous success stories, it should come as no surprise that the ESA also is broadly popular with the American people. Recently published peer-reviewed research from Ohio State University found that roughly four out of five Americans support the ESA.[19] Previous studies by Hart Research in 2016 and Tulchin Research in 2015 found similar results; between 80 and 90 percent of Americans supported the ESA and agree that saving at-risk wildlife from going extinct is an important goal for the federal government.[20]

III. The Sixth Mass Extinction

Unfortunately, the need for a strong ESA is greater than ever. Despite significant efforts to prevent extinction, the loss of biodiversity, driven largely by habitat degradation and destruction, remains a rapidly growing problem.[21] Climate change and ocean acidification, which were barely on the radar when the ESA was written, are only exacerbating the trend.

The result is a global extinction crisis of epic proportion, in which half of all species could be facing extinction by the end of the century. In a 2017 study published in the Proceedings of the National Academy of Sciences, researchers found that of the 27,600 land-based mammals, birds, amphibians and reptile species studied, nearly one-third are shrinking in population numbers and territorial ranges.[22] Even more startling, in just the last forty years, we have lost *half* of all wild animals on Earth.[23] That is a sobering statistic. Further, the rate of extinction is happening at a pace at least 100 times greater than what would be considered normal. Scientists estimate that by 2050, well within our children's lifetime, 10 percent of all terrestrial species will be "committed to extinction."[24]

This is what scientists now call the Sixth Extinction. Unlike previous extinction events, it is largely being caused by man himself. Faced with the impact of our own hands on the diversity of life, we have a

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[19] Misti Crane, *Most Americans Support Endangered Species Act Despite Increasing Efforts to Curtail It*, Ohio State News, July 19, 2018, https://news.osu.edu/most-americans-support-endangered-species-act-despite-increasing-efforts-to-curtail-it/; Jeremy T. Bruskotter et al., *Support for the U.S. Endangered Species Act Over Time and Space: Controversial Species Do Not Weaken Public Support for Protective Legislation*, Conservation Letters, e12595 (2018), https://doi.org/10.1111/conl.12595.

[20] Tulchin Research, *Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters Nationwide*, July 6, 2015, http://www.defenders.org/publications/Defenders-of-Wildlife-National-ESA-Survey.pdf; Hart Research Associates, *CAP Energy/Environment/Climate Voters Survey,* Dec. 2016, https://cdn.americanprogress.org/content/uploads/2017/01/18040011/FI-CAP-Energy-Enviro-Dec2016.pdf.

[21] *See, e.g.*, Stuart L. Pimm et al., *The Biodiversity of Species and Their Rates of Extinction, Distribution, and Protection*, 344 Science 987 (2014); David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 Am. Inst. Bio. Sciences 607 (1998); National Research Council, *Science and the Endangered Species Act* 72 (1995), https://www.nap.edu/read/4978/chapter/6#72 ("[T]here is no disagreement in the ecological literature about one fundamental relationship: sufficient loss of habitat will lead to species extinction.").

[22] Gerardo Ceballos, Paul R. Ehrlich, and Rodolfo Dirzo, *Biological Annihilation Via the Ongoing Sixth Mass Extinction Signaled By Vertebrate Population Losses and Declines*, PNAS E6089-E6096 (July 10, 2017), http://www.pnas.org/content/pnas/114/30/E6089.full.pdf.

[23] *Id*.

[24] Elizabeth Kolbert, *The Sixth Extinction: An Unnatural History* 167–68 (2014); *see also* Daniel A. Farber, *Separated at Birth? Addressing the Twin Crises of Biodiversity and Climate Change*, 42 Ecology L.Q. 841, 846 (2016) (noting that climate change will exacerbate biodiversity loss).

responsibility to ourselves, to our children and to the planet itself to act. As famed scientist E.O. Wilson has said, "The one process now going on that will take millions of years to correct is the loss of genetic and species diversity by the destruction of natural habitats. This is the folly our descendants are least likely to forgive us."[25] It is up to us to halt and reverse this damage to the web of life.

Biodiversity decline is the proverbial canary in the coal mine, a symbol of what we are doing to the Earth. And what befalls the earth ultimately will come back to haunt us. As Congress once understood, there are many reasons to be alarmed about the loss of biodiversity, not the least of which is its ultimate impact on humans. Threatened and endangered species provide tangible services and benefits to people, playing important roles in providing us with clean water, food, medicines and more. Beyond such material benefits, species have intangible existence and spiritual value. The value of Earth's biodiversity "is, quite literally, incalculable," the House report for the ESA stated back in 1973. "Sheer self-interest impels us to be cautious."[26]

IV. The Western Caucus Bills Would Cripple Species Conservation

So why, when the need for conservation and concern for our future is greater than ever, is this Committee considering a suite of bills that would, each in its own way, undermine the ESA and cripple our efforts to conserve endangered species? If we are to avert this looming extinction crisis we should strengthen the laws and policies, especially the ESA, that protect imperiled species and their habitat. But these bills would do just the opposite. While some of these proposals are solutions looking for a problem, others are direct attacks on the very foundations of the ESA.

Despite their superficially attractive yet often Orwellian acronyms (like the LOCAL Act or the EMPOWERS Act), not one of these bills would enhance the conservation of endangered species in this country or stimulate their recovery. Rather, they would undermine sound science-based decision making, create unnecessary barriers to the listing of species, weaken protections against take, exempt areas from critical habitat designation, decrease opportunities for public participation, and increase burdens on already fiscally-strapped wildlife agencies. Overall, these bills would take a wrecking ball to the ESA, and all to benefit a minority of special interests in a few western states.

H.R. 3608: Endangered Species Transparency and Reasonableness Act of 2018

This bill would subvert the ESA's bedrock requirement that listing decisions be based on sound science by simply declaring that all information submitted by state, tribal or county governments must be considered as the best scientific and commercial data available, irrespective of its actual merit. The ESA already encourages governments to submit information that may aid the Services in making listing decisions. That information is assessed, like any other, for its accuracy and reliability. Under this provision, information of any quality provided by state, tribal, and county governments – even data that are flatly wrong – would be presumed equivalent, if not superior, to peer-reviewed research from leading species experts. Adding an additional burden, the bill requires the Services to make information that served as the basis for listing and critical habitat determinations publicly available online, but it exempts information that is subject to state privacy laws. This exemption could undermine transparency and encourage states to pass laws shielding commercial data from public inspection to appease special interests.

[25] Edward O. Wilson, *Biophilia* 121 (1984).
[26] H.R. Rep. 93-412, pp. 4-5 (1973).

Notably, the bill also targets citizen enforcement of the ESA by capping and increasing the difficulty of obtaining litigation fees, in addition to requiring publication of yearly reports detailing federal expenditures related to ESA cases, including settlements and attorneys' fees. Citizen enforcement is a critical part of the ESA's design, and central to the rule of law. These provisions could deter citizens from providing a vital check in the form of judicial review of erroneous agency decision making.

H.R. 6344: Land Ownership Collaboration Accelerates Life Act of 2018 (LOCAL Act)

The LOCAL Act would create a major loophole in the ESA's prohibition on take of endangered and threatened species that could eviscerate protections for species that are already on the brink of extinction. This bill proposes to add provisions under a new section 10(l) that would allow individuals to request a determination from the Secretary regarding whether a particular activity would constitute unlawful take. If the Secretary determines that the proposed activity complies with the law, then any use or action taken by the property owner in "reasonable reliance" would be exempted from the take prohibitions of the ESA. If the Secretary fails to respond to such a request within 180 days, the activity would automatically be exempt from the ESA's take prohibition.

The LOCAL Act would unreasonably burden the Secretary, who may lack the resources necessary to provide a timely response, while at the same time creating incentives for individuals to inundate the Secretary with requests in the hopes of obtaining authority to take listed species outside of the normal permitting process. After a missed deadline, an automatic no take determination would remain effective for five years; if the Secretary responds that the requested activities do not constitute a take, this determination would be effective for ten years. Under the bill, the Secretary may only withdraw such a determination in the case of unforeseen changed circumstances.

Most disturbing, if the Secretary finds that the proposed use would not comply with the ESA's take prohibition (or withdraws a no take determination), the LOCAL Act would entitle the landowner to financial compensation for the full market value of its proposed use. This sweeping provision effectively pays property owners to comply with the law and would quickly bankrupt funding for the ESA. The requirement to pay full market value for a proposed use, without regard to the relative extent of the property owner's loss or the other economic uses to which its property can be put, violates settled constitutional principles governing compensation for regulatory takings and invites speculative and fraudulent claims. The Fifth Amendment of the Constitution guarantees just compensation when an individual's property is taken for public use, but a mere regulation does not trigger compensation unless the property owner suffers a physical appropriation or a near total loss of a property's economic value.[27] All citizens benefit from government regulation that maintains a healthy environment, and their use of their property can be limited by such regulation without compensation except in the rare case where it rises to a government taking. As Justice Oliver Wendell Holmes, Jr. recognized in the seminal case that defined regulatory takings, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[28] The LOCAL Act thus provides a financial windfall without any constitutional basis to selected property owners simply to ensure that they comply with the ESA. This would cripple the ESA's implementation.

[27] *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).
[28] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

H.R. 6345: Ensuring Meaningful Petition Outreach While Enhancing Rights of States Act of 2018 (EMPOWERS Act)

The EMPOWERS Act would require the Services to engage in an elaborate notice and consultation process with states and counties and would provide states and counties with de facto veto power over listing and critical habitat decisions. Upon finding that a petition to list a species or revise its critical habitat may be warranted, H.R. 6345 directs the Secretary to seek out from state and county governments information related not just to the species' status but also to the potential impacts of the petitioned action on the locality and invites state and county officials to advise whether such action is "merited." The EMPOWERS Act thus opens the door to elevating non-biological factors, such as economic costs, in the listing process.

Most concerning, if a state or county objects to a proposed listing or critical habitat determination, this bill would forbid the Secretary from proceeding with the action unless the Secretary demonstrates that information submitted by the locality is "incorrect" and that the action is warranted. The Secretary is thus precluded from listing a species or revising its critical habitat if any information submitted by a locality is correct (or cannot be demonstrated to be incorrect), regardless of whether that information is relevant to the decision or sufficient to overcome other scientific information in the record that supports the action.

As with H.R. 3608, this bill elevates political considerations over sound science. States and local governments have ample opportunities to participate in the listing process and provide relevant information to the Services. The ESA already requires the Secretary to notify states and counties of proposals to list species or designate critical habitat and invite their comments, and requires the Secretary to furnish a written justification to a state if he or she issues a listing or critical habitat regulation that conflicts with the state's comments.[29] A 2016 Obama administration regulation already requires petitioners to notify states of their intention to file a listing petition.[30] The elaborate procedure that would be established under the EMPOWERS Act is thus unnecessary to ensure that states and localities can fully participate and submit relevant information in the petition process, and its provisions inviting consideration of non-biological factors in listing and granting states and counties an arbitrary veto over listings and revisions of critical habitat plainly subvert the integrity of the ESA.

H.R. 6346: Weigh Habitat Offsetting Locational Effects Act of 2018 (WHOLE Act)

The WHOLE Act strikes at what many have called the "heart of the ESA"—the section 7 consultation process. Section 7 requires that federal agencies consult with the Services whenever an action authorized, funded or carried out by the agency could jeopardize the continued existence of a listed species or adversely modify its critical habitat. Formal consultation results in a biological opinion and incidental take statement that sets forth reasonable and prudent measures to minimize the take of listed species. This bill adds a requirement that the Secretary consider the "offsetting effects of all avoidance, minimization, and other species-protection or conservation measures that are already in place or proposed to be implemented as part of the action, including the development, improvement, protection, or management of species habitat whether or not it is designated as critical habitat of such species."

[29] 16 U.S.C. §§ 1533(b)(5)(A), (i).
[30] 50 C.F.R. § 424.14(b).

The Services already consider avoidance, minimization and other conservation measures that are included in a proposed action during consultation, as well as evaluating existing conservation measures that benefit a species as part of the environmental baseline. In doing so, however, the Services evaluate the reliability of such measures, including the extent to which they are funded, the certainty of their implementation and the likelihood that they will in fact provide the projected benefits to the species. Such evaluation is essential, since the environmental record is replete with instances where agencies or project proponents have failed to implement mitigation measures or where such mitigation fails to achieve its expected benefit. The direction in the WHOLE Act to consider "all" such measures appears to direct the Services to consider any mitigation proposal, regardless of how speculative, unfunded or ineffective it may be. Moreover, requiring the Services to consider "the offsetting effects" of existing conservation measures is illogical, since beneficial measures already in place cannot "offset" the detrimental impacts of new actions. The extent to which existing conservation measures have benefited a species is properly considered in evaluating the environmental baseline regarding the status of the species.

H.R. 6354: Stop Takings on Reserves Antithetical to Germane Encapsulation Act of 2018 (STORAGE Act)

This bizarrely named bill prohibits the designation of critical habitat within reservoirs, canals, and other water storage, diversion or delivery facilities where habitat is periodically created and destroyed due to changing water levels resulting from the operation of these facilities. This unnecessary bill would have limited application but risks blocking the designation of critical habitat that may be necessary for a species to survive. The prevalence of reservoirs and water projects throughout areas of the western United States has contributed to widespread losses of riparian habitat that are essential for imperiled species. As the west experiences changes in its long-term hydrological cycle due to climate change, many reservoirs operate at reduced capacity, restoring riparian habitat that may be highly valuable for listed species. Any designation of critical habitat in such areas would have to take into account adverse economic impacts, including constraints on the future operation of the facility, so such designation is unlikely except where changes in the operation of a project create opportunities to restore riparian habitat over a long term without disruption of a project. This bill would preclude consideration of such habitat protection altogether.

H.R. 6355: Providing ESA Timing Improvements That Increase Opportunities for Nonlisting Act of 2018 (PETITION Act)

The PETITION Act is among the most problematic bills being considered by this Committee. The bill declares, without evidence, that the listing petition process, a key safeguard that allows citizens to petition for protection of species that face extinction, is overloaded because of the intentional submission of frivolous petitions with the express purpose of forcing the Service to miss statutory deadlines or list species that do not deserve protection.

These charges are unfounded. As the Government Accountability Office (GAO) recently found, other than setting schedules for completing actions required under section 4, settlement agreements in deadline litigation "did not affect the substantive basis or procedural rule-making requirements the Services were to follow in completing the actions."[31] There is simply no basis for the claim that deadline settlements lead to species being listed that do not, as a scientific matter, warrant the protections of the

[31] U.S. Government Accountability Office, *Environmental Litigation: Information on Endangered Species Act Deadline Suits*, GAO-17-304 at 19 (Feb. 28, 2017), https://www.gao.gov/products/GAO-17-304.

ESA. Nor is there any basis for the conspiracy theory that environmentalists intentionally submit unwarranted listing petitions in order to overload the listing system. I am unaware of any court decision or agency determination that has concluded that environmentalists have done so. Although citizen petitions have at times strained the capability of the Services, that is a reflection of the limited resources the Services are provided for listing. Citizen petitions have led to the listing of many species from the loggerhead sea turtle to the polar bear and the red knot that are critically imperiled and fully warrant the protections of the ESA.[32]

If the premise that the petition process is being intentionally abused were limited to "findings," the bill could be dismissed as partisan rhetoric. That demonstrably false accusation underlies highly damaging substantive provisions, however, that would cut the heart out of the ESA by precluding the Services from even considering listing petitions during any period when a backlog of listing petitions exists. Without providing additional resources to avoid such backlogs, this approach would prevent species from receiving the protections of the ESA and could lead to their extinction.

This bill requires the Secretary to declare "petition backlogs" and suspend listing decisions if the number of species included in petitions with missed 90-day or 12-month findings exceeds 5 percent of the number of species for which 90-day or 12-month petitions have been presented over the last 15 years. Once a backlog for these petitions has been declared, under most circumstances, the bill requires the Secretary to prioritize addressing petitions to delist or downlist species above petitions to list or uplist species until the backlog is resolved. The bill would suspend statutory deadlines for responding to petitions to list or uplist species, and automatically deny most petitions to list or uplist species during a petition backlog. The bill also precludes judicial review of decisions denying listing petitions, but not of decisions granting listing or denying delisting or downlisting petitions, thus depriving citizens seeking to protect species of their rights to seek court redress while empowering industries and property owners who oppose listings and press for delisting species to challenge decisions adverse to their interests.

The PETITION Act would deny ESA protection for imperiled species due to resource constraints that prevent the Secretary from meeting statutory petition deadlines, and that are wholly the fault of Congress in failing to provide adequate funding for the ESA. It would elevate delisting of species that are, by definition, no longer in peril over the protection of species that face imminent extinction. It subverts the very purpose of the ESA.

H.R. 6356: Less Imprecision in Species Treatment Act of 2018 (LIST Act)

Like the PETITION Act, the LIST Act also subverts the ESA's science-based process for evaluating whether a species is recovered and should be delisted. The ESA currently requires that the same process and criteria be used to both list and delist a species by making a determination on the basis of the best scientific and commercial data available when considering the five listing factors under section 4(a)(1). The courts have held that those factors, and not other considerations such as the goals of recovery plans, must form the basis for any decision to list or delist.[33]

The LIST Act, however, directs the Secretary to delist species if the Department of the Interior (oddly, the Department of Commerce, which shares the administration of the ESA, is omitted) has produced or

[32] *See also* Editorial, *The Public Role in Species Protection*, N.Y. Times, Aug. 29, 2012, https://www.nytimes.com/2012/08/30/opinion/the-public-role-in-species-protection.html (citing examples).
[33] *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432-33 (D.C. Cir. 2012).

received substantial information demonstrating that the species "is recovered" or that the goals of a recovery plan for a species have been met regardless of the statutory factors set forth in section 4(a). This change would subvert the integrity of the ESA because the delisting process would no longer require a methodical review of the listing factors to ensure that a listed species is not threatened or endangered, elevating recovery goals above the statutory factors that determine whether a species is threatened or endangered. The bill does not define what might constitute "recovery," leaving that critical concept ambiguous and creating the obvious risk that species that still qualify under section 4(a) may lose statutory protection. Moreover, the bill dispenses with rulemaking requirements intended to ensure public transparency and reliability of agency information, directing that the Secretary only publish a notice that a species is being removed rather than the text of a proposed delisting regulation, as now required by the ESA.

The LIST Act also establishes a one-sided process for delisting based on the false premise that many species are erroneously listed. The bill would allow for cursory delistings if the Secretary determines, based on information submitted by third parties or developed by the Department of the Interior (again, oddly omitting the Department of Commerce), that the species was listed based on information that was "inaccurate beyond scientifically reasonable margins of error," fraudulent, or misrepresentative. If the Secretary determines that the listing was less than likely to have occurred absent such information, the species would be cursorily delisted (without consideration of the statutory factors in section 4(a)) and that determination would not be subject to judicial review. By contrast, as usual in these bills, a decision by the Secretary that finds that the original petition did not contain inaccurate, fraudulent or misrepresentative information *would* be subject to judicial review by parties interested in forcing the delisting of the species.

Finally, in an apparent attempt to limit citizen petitions, the bill would punish a person who submitted a listing petition containing any information later determined to be inaccurate beyond scientifically reasonable margins of error, fraudulent, or misrepresentative by prohibiting the person from submitting future petitions for ten years.

H.R. 6360: Permit Reassurances Enabling Direct Improvements for Conservation, Tenants, and Species Act of 2018 (PREDICTS Act)

This bill unnecessarily codifies the existing well-established practice of allowing non-federal landowners to enter into Candidate Conservation Agreements with Assurances and Safe Harbor Agreements. H.R. 6360 requires that all Incidental Take Permits, Candidate Conservation Agreements with Assurances, and Safe Harbor Agreements contain assurances governing permit revocation, changed circumstances, and unforeseen circumstances. But the bill only allows the Secretary to revoke these permits and agreements in very limited circumstances. In contrast to current administrative practice established in Service regulations, the bill would not allow termination for the landowner's failure to implement the agreement or violations of law. The bill thus makes it more difficult for the Secretary to enforce these agreements or alter them in the face of changed circumstances.

H.R. 6364: Localizing Authority of Management Plans Act of 2018 (LAMP Act)

Like many of the bills under consideration, H.R. 6364 would expand the role of the states in implementing the ESA and impair the ability of federal agencies to conserve species. Section 6 of the ESA allows states and the federal government to enter into cooperative agreements, whereby the states propose programs to conserve listed species and the Secretary assists with the management of those programs. The LAMP Act, however, would amend this provision to authorize the Secretary to broadly

transfer management of resident listed species to state governments, and to provide federal funding to support the state program. Unlike the current section 6, states will be permitted to protect only some species or taxonomic groups of species, rather than all species listed under the ESA. In addition, the bill removes language from current law that prevents states from enacting laws that are less restrictive than federal laws, creating the risk that state programs established under this authority will relax existing protections for listed species.

Proposals to delegate the ESA to the states raise very substantial risks for the integrity and effectiveness of the law. Although states play a vital role in conserving resident species of wildlife, their focus has historically been on the management of game species, and the funding for state fish and wildlife agencies is often derived primarily from hunting licenses and fishing permits. States have in more recent years begun to engage with conserving non-game species, in part stimulated by the provision of federal funds for such conservation through state wildlife grants. But states still generally lack the legal authority under state law, the biological expertise, or the funds to effectively conserve imperiled species. A recent study by the University of California Irvine School of Law found that few state ESA laws protect all endangered species within their state, that many state ESA laws do not require decisions to be based on sound science, that few state ESA laws require consultation with expert state fish and wildlife agencies on the effects of state approved projects on listed species, that most state ESA laws do not allow citizens to petition for listing or delisting species, that most state ESA laws fail to provide authority for the designation and protection of critical habitat, that few state ESA laws even protect against harm to listed species' habitat, that virtually no states have authority to plan for species recovery, and – perhaps most revealing – that state expenditures make up only approximately 5 percent of ESA spending.[34] As the authors of the study conclude: "[W]ithout significant state law reforms in most states, the proposed devolution of federal authority and responsibility over threatened and endangered species to states is likely to undermine conservation and recovery efforts, lead to a greater number of species becoming imperiled, and result in fewer species recovered."[35]

The LAMP Act would also allow non-federal parties to manage species on certain public and private lands while being exempted from the ESA's consultation requirement and take prohibition. The ESA currently allows the Secretary to enter into "management agreements" with states that allow the state to manage areas established for the conservation of a listed species. The LAMP Act, however, would allow the Secretary to enter into "cooperative management agreements" with any unit of government or non-federal person. In addition to expanding the scope of who may enter into such an agreement, the LAMP Act would allow parties to a cooperative management agreement to manage both species and land, as opposed to the current ESA's provisions that states may only manage land. Moreover, the LAMP Act would exempt parties to an agreement from sections 5, 7, and 9 of the ESA, allowing them to forgo consultation on federal actions and ignore the ESA's take prohibition. These provisions empower local governments and non-federal parties, such as oil and gas companies, to apply for authority to manage species, undermining the authority of both the federal government and the states over wildlife. Such entrants may have subversive motives or insufficient knowledge, pushing imperiled species even further toward extinction. Finally, the LAMP Act would exempt entry into cooperative management agreements from review under the National Environmental Policy Act, allowing the Secretary to ignore the potential environmental impacts of entering into such agreements.

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[34] Alejandro E. Camacho, et al., *Assessing State Laws and Resources for Endangered Species Protection*, 47 Envtl. L. Inst. 10837 (2017), https://www.law.uci.edu/centers/cleanr/news-pdfs/cleanr-esa-report-final.pdf.
[35] *Id*. at 10837-10838.

CONCLUSION

The ESA has been an indispensable safety net for fish, wildlife and plants. As former Speaker of the House Newt Gingrich wrote in a recent book: "Bold leadership produced the Endangered Species Act in 1973, perhaps the most effective piece of environmental legislation in our country's history. The act has been, by any measure, a very successful guardian of wildlife and habitat and any attempt to weaken it should be resisted."[36] Unfortunately, the bills pending before this Committee ignore the ESA's achievements and popularity and would seriously undermine species conservation.

None of these bills would improve species conservation. Each would undermine the ESA, often dramatically. If these measures are enacted, species deserving of federal protection will be denied the help they need to survive and recover.

This is not the time to play politics. If the proponents of these bills are really interested in helping species recovery and avoiding further extinctions, they should support critically needed funding increases for the Services rather than advancing these damaging legislative proposals that only undermine the ESA. On behalf of Defenders of Wildlife and our 1.8 million members and supporters, I strongly urge this Committee to reject every one of these dangerous bills.

[36] Newt Gingrich & Terry Maple, *A Contract with the Earth: Ten Commitments You Can Make to Protect the Environment Now* 170 (2008).