

**Testimony of
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U.S. Fish and Wildlife Service, Department of the Interior
Before the
House Committee on Natural Resources,
Subcommittee on Water, Wildlife, and Fisheries
On**

H.R. 520, To amend the Endangered Species Act of 1973 to provide that artificially propagated animals shall be treated the same under that Act as naturally propagated animals, and for other purposes; H.R. 5504, To require the Director of the United States Fish and Wildlife Service and the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration to withdraw proposed rules relating to the Endangered Species Act of 1973, and for other purposes; and H.R. 5509, “Electronic Permitting Modernization Act”

October 25, 2023

Introduction

Good morning, Chairman Bentz, Ranking Member Huffman, and Members of the Subcommittee. I am Gary Frazer, Assistant Director for Ecological Services for the U.S. Fish and Wildlife Service (Service) within the Department of the Interior (Department). I appreciate the opportunity to testify before you today on two bills related to the Endangered Species Act (ESA) and one bill related to modernization of permitting systems within the Department.

The Service’s mission is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. For more than 150 years, the Service has collaborated with partners across the country and around the world to carry out this mission.

Implementation of the ESA is a cornerstone of the Service’s responsibilities in stewarding plants, fish, and wildlife. Through this law, Congress set a public policy to address the loss of biodiversity and prevent species extinctions. The ESA, which turns 50 this year, plays a pivotal role in protecting threatened and endangered species and their habitat, and in implementing wildlife conservation treaties including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Through CITES, the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish, wildlife, and plants facing extinction. A key component of the ESA is the protection and restoration of global biodiversity, which requires healthy wildlife and plant populations, living in the wild, that retain genetic diversity for long-term sustainability.

Central elements of the Service’s implementation of the ESA, are (1) a reliance on, and prioritization of, the best available science; and (2) a careful adherence to our thorough rulemaking process. The Service, and other agencies responsible for carrying out the ESA, must have science-based, clear, and up-to-date implementing regulations. Day-to-day work related to interagency cooperation under Section 7 of the ESA, classification of species and designation of

critical habitat under Section 4, and protection of threatened species under Section 4(d), are all underpinned and guided by our implementing regulations.

Alongside the conservation of threatened and endangered species in the U.S., the Service also works globally with partners to protect, restore and conserve all wildlife populations and their habitats in the face of increasing environmental challenges and human demand through development, outdoor recreation, and trade. To balance resource use and protection, the Service issues a multitude of wide-ranging permits under the laws we implement. Permits issued by the Service help facilitate important activities such as scientific research and the import of hunting trophies under CITES, and rehabilitation, education, and depredation under the Migratory Bird Treaty Act. Ensuring that these permits are easily accessible and navigable is essential for the Service's responsibility to the American people and to ensure compliant conservation actions are taken in a timely manner.

The Service appreciates the Subcommittee's interest in the ESA and electronic permitting. We offer the following comments on the three bills under consideration today and look forward to discussing our views with the Subcommittee.

H.R. 520, To amend the Endangered Species Act of 1973 to provide that artificially propagated animals shall be treated the same under that Act as naturally propagated animals, and for other purposes

H.R. 520 would amend Section 4 of the ESA to require that the Secretary of the Interior or the Secretary of Commerce (as appropriate) not distinguish between naturally and artificially propagated animals in making any determinations under the ESA. This would include determinations of threatened or endangered species status, as well as an array of other actions such as critical habitat designations or recovery plans. The bill would also amend Section 14 of the ESA to require the Secretaries to authorize the use of artificial propagation of animals for any mitigation required under the ESA regarding that species. The bill would make the amendments applicable to all endangered or threatened species listed before, on, or after the date of enactment of the legislation.

The Service opposes H.R. 520 and outlines several concerns with this legislation below.

The intent of the ESA is to recover wild populations of species in their natural habitat whenever possible. In well-managed circumstances, controlled propagation can support the recovery of some listed species and can be used to reverse declines and return listed species to suitable habitat in the wild. For example, genetically managed conservation breeding programs can be used for reintroductions of species into the wild (e.g., Species Survival Plan programs). However, controlled propagation is not necessary or appropriate for every species, must be carefully managed to support the conservation of wild populations, and is not a substitute for addressing the primary threats to the species. A species listing is based on primary threats described in a listing rule. Species recovery is not simply a matter of numbers of individuals, rather recovery is dependent upon fully addressing the threats for the long term, so that species are restored to ecological health.

Section 10(j) of the ESA allows the Service to establish experimental populations as a recovery tool and in July 2023, the Service revised these regulations to provide more flexibility to

establish experimental populations outside of a species' historical range when important to address threats like climate change. The regulations outline requirements and considerations for establishing these populations using the best available science and could allow using species that were propagated in a genetically managed breeding program. In addition, the Service and the National Marine Fisheries Service (NMFS; collectively the Services) have an existing policy that addresses the role of controlled propagation in the conservation and recovery of species listed as endangered or threatened under the ESA (65 FR 56916). Including plant species, over 700 of the approximately 1,690 domestic species currently listed under the ESA have some kind of controlled propagation program. Given that the Service currently has the flexibility to use controlled propagation as a tool to aid in species recovery, H.R. 520 would not provide any additional benefit to species protected under the ESA but could have negative repercussions for species recovery.

H.R. 520 does not include definitions for several important terms and lacks clarifying language for implementation of the legislation. There are no definitions for the terms "animal" or "artificially propagated," so there is no distinction between breeding in captivity for conservation purposes and other forms of artificial or controlled propagation. Without a definition or clarifying language, there is no requirement that the breeding be for conservation and reintroduction or ensuring healthy and sustainable species genetics, which are important factors to ensuring benefits to wild populations. There is also no delineation of qualified entities to conduct the artificial propagation, or discussion of qualifications or licensing of the individuals conducting such work or maintaining such facilities, which risks improper breeding of species. Further, as written, this bill would allow animals cultivated in commercial breeding operations for commercial sale, including human consumption, to qualify as artificially propagated animals and be treated the same as naturally propagated animals. Commercially raised animals often are not behaviorally suitable for release into the wild, and often differ substantially from their wild counterparts due to selective pressures from humans and the captive environment. As such, artificially propagated animals should not be treated the same as naturally propagated animals in every circumstance under the ESA, as would be required under H.R. 520.

Additionally, H.R. 520 would violate the United States' implementation of CITES, which includes different requirements for captive-bred or artificially propagated versus wild specimens, as there is no clear distinction in the legislation that the requirements would apply only with regard to requirements for ESA-listed species and not affect the separate international requirements for CITES-listed species.

H.R. 520 could lead to impacts on the long-term health of wild and captive-bred animals. A lack of sound and appropriate management of controlled propagation of listed species presents many genetic and ecological risks and may be counter to recovery efforts. In most captive breeding programs, not all individual animals are suitable for release or breeding. Captive-bred animals can also become behaviorally adapted to captivity, and maladapted for survival and reproduction in the wild. In addition, wild animals and plants are often more resilient to climatic changes, such as drought, as compared to propagated animals and plants, and are better able to adapt to climate change, helping to preserve biodiversity long into the future. Genetic diversity and the potential for genetic bottlenecks is also a concern if controlled propagation is not conducted according to sound genetic management plans. The Services' controlled propagation policy addresses sound management of controlled propagation when it is recommended for recovery of listed species.

H.R. 520 may prevent the Service from implementing and applying its controlled propagation policy and use of best available science to ensure controlled propagation of listed species is soundly managed and consistent with the recovery and conservation needs of listed species.

While Section 1 of this legislation only directly amends Section 4 of the ESA, it would pertain to determinations in all sections of the ESA including Section 7 consultations and ESA permitting decisions. For example, the Services currently consider propagated animals in Section 7 consultations and, consistent with the ESA, the Services' consideration takes into account factors such as genetic diversity and suitability for release, as informed by the best scientific and commercial data available. As written, it appears H.R. 520 would preclude the Services from basing determinations on the best scientific and commercial data available.

Finally, the Service also has concerns regarding the requirement that the Secretary shall authorize the use of artificial propagation of animals of a species for purposes of any mitigation required under the ESA related to that species. The Service already has the authority to utilize artificially propagated animals for mitigation in circumstances where it is appropriate, and we do so when that is in the best interest of conservation of the species. That said, for most species, artificial or controlled propagation is not appropriate as mitigation as it does not directly address the species' conservation needs. For the vast majority of species, traditional mitigation approaches, such as habitat restoration and protection, are more effective and scientifically appropriate. Whether or not wild or artificially propagated animals are utilized should be based solely on the best available science.

While the Service opposes H.R. 520, we would welcome the opportunity to discuss the intent of the legislation and the Service's current use of controlled propagation to support species recovery in the wild with the sponsor and the Subcommittee.

H.R. 5504, To require the Director of the United States Fish and Wildlife Service and the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration to withdraw proposed rules relating to the Endangered Species Act of 1973

H.R. 5504 would require the Services to withdraw proposed rules revising regulations under Section 7 of the ESA on Interagency Cooperation (88 Fed. Reg. 40753) and Section 4 of the ESA on Listing Endangered and Threatened Species and Designating Critical Habitat (88 Fed. Reg. 40764). The legislation would also require the Service to withdraw the proposed rule revising regulations under Section 4(d) of the ESA Pertaining to Endangered and Threatened Wildlife and Plants (88 Fed. Reg. 40742). H.R. 5504 would prohibit the Services from taking any action to finalize, implement, or enforce these proposed rules.

The Service opposes H.R. 5504. The ESA assigns the Secretary the responsibility to develop regulations to implement this statute. The Services are doing so in this rulemaking process following the best available science, and the administrative processes prescribed by the ESA and the Administrative Procedure Act (APA), including public review and comment. The Service believes that this is the proper path for carrying out our statutory responsibility for implementing the ESA.

In January 2021, the President issued Executive Order 13990, which, in Section 2, required all executive departments and agencies to review Federal regulations and actions taken between

January 20, 2017, and January 20, 2021. Subsequently, in June 2021, the Services announced a plan to improve and strengthen implementation of the ESA. This plan included tailored revisions to the regulations for listing species and designating critical habitat, and for interagency cooperation. It also included reinstating the option of applying the protections afforded to endangered species to species listed as threatened under the ESA (“blanket” 4(d) rule). In response to this Executive Order and in accordance with commitments made in response to litigation and a court-ordered remand, the Services have proposed revisions to the 2019 regulations.

On June 22, 2023, the Services proposed to revise two final rules that had been jointly issued in 2019 under Sections 7 and 4 of the ESA, and the Service proposed to reinstate the option to apply the protections afforded to endangered species to threatened species (also known as the “blanket 4(d) rule”) under Section 4(d) of the ESA, which had been removed in 2019. In conducting our review and putting forward our proposed rules, the Services followed the core principles of science-based evaluation and public participation and comment as part of our rulemaking procedures.

The Services’ proposed rule regarding Section 7 of the ESA would amend portions of the regulations under the 2019 final rule that govern interagency cooperation. Our review of the 2019 rule indicated that, while most of the changes finalized in that rule met the intent of clarifying and improving the consultation process, certain revisions would be beneficial to further improve and clarify interagency consultation, while continuing to provide for the conservation of listed species.

The proposed Section 7 revisions to the 2019 final rule include clarifying the Service’s responsibilities regarding reinitiation of consultation, clarifying the definitions “effects of the action” and “environmental baseline,” and removal of Section 402.17 “Other Provisions” that was added in the 2019 final rule. These proposed revisions simplify the regulations and eliminate the need for any reader to consult multiple sections of the regulations to discern what is considered an “effect of the action.” In addition, the proposed rule includes amendments to the regulatory provisions relating to the scope of reasonable and prudent measures in an incidental take statement to better reflect congressional intent and serve the conservation goals of the ESA. Minimizing impacts of incidental take on the species through the use of offsetting measures can result in improved conservation outcomes for species and may reduce the accumulation of adverse impacts, sometimes referred to as “death by a thousand cuts.”

Ensuring Section 7 consultation regulations are clear and up to date is critical. Under Section 7 of the ESA, Federal agencies must consult with the Service or NMFS when any action the agency carries out, funds, or authorizes may affect a listed species or critical habitat. The purpose of the consultation is to ensure that any action Federal agencies carry out, fund, or authorize will not jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify their designated critical habitat. Since November 1, 2022, the Service has logged more than 87,000 requests for project reviews. Many of these requests were for Section 7 consultations for energy, infrastructure, and construction projects. The Service anticipates this workload will continue to rise with implementation of the Bipartisan Infrastructure Law and Inflation Reduction Act, and as our Nation’s population, economy, and infrastructure needs

continue to grow. The proposed rule will help ensure that Federal agency partners have greater clarity in their role in implementing the ESA through Section 7.

The Services' proposed rule regarding regulations under Section 4 would revise the 2019 final rule on listing species and designation of critical habitat. The proposed rule, published on June 22, 2023, would reinstate prior language affirming explicit Congressional direction that listing determinations are to be made "without reference to possible economic or other impacts of such determination". Decisions regarding classification determinations should be based solely on the best scientific and commercial data available as reflected in the language of the ESA, not possible economic or other impacts of listing, reclassifying, or delisting a species. The proposed rule would also revise the reasons for delisting by reinserting the word "recovered" to explicitly acknowledge that one of the fundamental goals of the ESA is to recover listed species. It would also revise the foreseeable future framework, revise the circumstances for when critical habitat designation may be not prudent, and revise the criteria for designation of unoccupied critical habitat. Revision of the critical habitat regulations will better prepare the Service and our partners to continue conserving species and their ecosystems as climatic conditions change.

The Service's proposed rule regarding regulations under Section 4(d) would reinstate the blanket 4(d) rules, which were withdrawn in 2019. The blanket 4(d) rules provide an option to extend most protections provided to endangered species to species listed as threatened, unless the agency adopts a species-specific 4(d) rule.

Reinstating the blanket 4(d) rule option, which was in place for more than 40 years prior to the 2019 withdrawal, will allow for a more efficient, straightforward, and transparent method to protect threatened species for which the Service finds the blanket rule protections are appropriate. It would also ensure there is never a lapse in threatened species protections. In situations where it is determined that the standard suite of Section 9 prohibitions, as well as several exceptions to those prohibitions, are appropriate for a threatened species, we would not need to develop any additional regulatory text to codify a species-specific 4(d) rule. If the proposed rule is finalized, the Service would still maintain the ability to issue species-specific 4(d) rules.

As a whole, these proposed rules provide important protections for species, strengthen consultation and listing processes, reaffirm the central role science plays in decisions that guide the protection and recovery of endangered and threatened species, and align with the conservation purposes and the statutory language of the ESA. In addition, the Services are carefully following the best available science, the rulemaking process outlined in the ESA, and the APA in promulgating these proposed rules.

H.R. 5509, Electronic Permitting Modernization Act

H.R. 5509, the Electronic Permitting Modernization Act, would direct the Secretary of the Interior to design and deliver electronic permitting systems for permits, forms, and other required paperwork, to the extent practicable. The Secretary would also be required to create a centralized repository with hyperlinks to all electronic permitting systems across the bureaus of the Department, and points of contact for customer service or technical assistance inquiries. Finally, H.R. 5509 would also require the Secretary to provide Congress with periodic updates on

implementation. The Department supports H.R. 5509, which aligns with modernization efforts already underway across the Department.

As a federal agency, the Service is committed to continually improving our delivery of and access to services for the public. In Fiscal Year (FY) 2020, the Service began creating a centralized, electronic system for permits called ePermits. Since then, we have been incrementally improving the system and increasing its capacity. Currently, ePermits has over 50,000 user accounts for over 80 different permit application forms and feedback has been increasingly positive. Examples of permits currently available on ePermits include CITES permits, ESA incidental take permits, and Migratory Bird Treaty Act depredation permits. At full capacity, ePermits will provide an efficient, modern, and secure system that improves the permitting process for Service stakeholders. In addition, other bureaus within the Department also maintain electronic permitting systems. For example, the Bureau of Safety and Environmental Enforcement maintains two electronic systems for well permitting: eWell and Technical Information Management System (TIMS Web).

H.R. 5509 would encourage further progress on modernizing permits, while providing the flexibility necessary for the Service to work with different regulatory, statutory, and treaty requirements of permits. This flexibility is also important across the Department as these systems require specialized structures to transfer, store, and process large amounts of data. Importantly, by allowing the Secretary to operate these systems “to the extent practicable”, H.R. 5509 allows the Department to evaluate best practices for protecting data, including data from Tribes and confidential business information that often have unique privacy protections and may need to be precluded from a centralized database or public release. Developing and maintaining these modern dynamic public-facing systems will require additional resources to increase agencies’ capacities, especially as permit requirements are added or updated and as more users apply online. The Service is requesting \$13.5 million in FY 2024 for ePermits to add new permits for the National Wildlife Refuge System and our Migratory Birds program, while improving the functionality of the system. We appreciate the sponsor’s and the Subcommittee’s efforts to work with the Service in ensuring that the modernization of electronic permitting systems is implementable and beneficial to the public.

Conclusion

The Service appreciates the Subcommittee’s interest in the ESA and electronic permitting. With the flexibility provided by the ESA, the Service is using controlled propagation as a tool to aid in species recovery. We have also issued proposed rules to provide science-based, clear, and up-to-date implementing regulations for the ESA. Additionally, the Service is striving to make permitting easier and more accessible through electronic systems that will improve service delivery to the public. We would welcome the opportunity to discuss these efforts further with the Subcommittee.