

**Written Statement
Testimony of**

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**Before the Subcommittee on Water, Wildlife and Fisheries
of the House Committee on
Natural Resources**

**Hearing on
Proposed Congressional Joint Resolutions Disapproving
Rules Enacted under the Endangered Species Act**

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My name is Robert L. Fischman. I am the George P. Smith, II Distinguished Professor of Law at the Indiana University Maurer School of Law. I am also a member scholar of the Center for Progressive Reform. I testify today on my own behalf; the views I express should not be attributed to any organization with which I am affiliated. I have written about and taught the Endangered Species Act (ESA) for three decades. My publications are listed in *curriculum vitae* I provided to the subcommittee.

The statement that follows reflects my view that piecemeal legislative fixes for specific species or local projects will not improve the performance of federal agencies in meeting the objectives of the ESA. Piecemeal legislation and micro-management of agencies risk undermining Congress' longstanding emphasis on science-based decision-making. Even worse would be to enact carve-outs from the ESA through the Congressional Review Act (CRA). The CRA resolutions the subcommittee is considering would create irreconcilable conflicts with the judiciary and thwart adaptation to unexpected circumstances.

Instead, I suggest the committee refocus its efforts to promoting collaborative conservation. That will require more funding for state agencies to prevent declining species from sliding to imperilment. It will require more appropriations for the Fish & Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) to list species while they are still threatened rather than delay until they are endangered. It will require better coordination with agricultural subsidies and other programs to offer more incentives for private land managers to engage in habitat recovery efforts. Congress' aspirations to prevent extinctions can become a reality only if the safety net for species is extended before they reach the "emergency room" of the ESA. The ESA today is an indispensable tool of federal biodiversity conservation, but it can work better if states and private habitat managers have incentives to cooperate.

I. Why the ESA generates intense conflicts

Often it seems that a partisan divide runs through federal wildlife law. But let me begin with Mollie Beatty's proposition to which I think we all subscribe: what a country chooses to save is what a country chooses to say about itself.

Most everyone in Congress cares about wildlife conservation, both as a patriotic tradition and as a self-preservation tool for all the services nature sustains for us. The Endangered Species Act, for example, passed Congress with overwhelming majorities (unanimously in the Senate and 355-4 in the House).

What generates the rancor, mostly, is not whether to care for God's creation, but who should pay the costs.

State wildlife management is the first line of defense to prevent extinctions. Yet, states sorely lack funds. You likely read your state's wildlife action plan, which lists the "species of greatest conservation need" (SGCNs). These are the plants and animals facing serious threats to their ability to thrive. They are species most likely to decline into endangerment. If states were better funded, they could stave off listings when economic trade-offs are at the least consequential. Unless Congress enacts better state funding mechanisms, such as those in the Recovering

America's Wildlife Act bills that died last year, the SGCN list of 17,118 will grow and spill into a deluge of new listings.

The holes in the state wildlife safety net permit far too many species to decline to the point of near extinction. As you know, the FWS cannot keep up with the listing tidal wave. Hundreds of species already determined by the Services to warrant listing languish while the Services focus on other priorities. Of course, in this system of biodiversity triage, the animals closest to the brink of extinction should receive priority. But, by the time most species get to the front of the listing line, populations are so low and habitat so scarce that it is much more expensive to achieve recovery.

Then there are the landowners who possess habitat for imperiled species. Often these landowners have been such good stewards that, even as neighbors degraded habitat, they conserved. But once a species is listed, those farsighted conservation actions become a liability as habitat for a listed species may be critical for recovery. Imposing on those good stewards of creation the full cost of protecting species is inequitable. But, without adequate state or federal recovery spending, what is left is coercive regulation.

Nonetheless, even the strictest wildlife conservation law, the Endangered Species Act, can be leveraged with innovative, collaborative programs. I recently studied one program, section 4(d), which allows the FWS service to tailor the otherwise strict prohibitions against take to the conservation needs of the listed species.¹ One example of 4(d) tailoring is the protective regulation for the threatened *Mazama* pocket gopher. It is practically impossible to detect harm from agricultural activities, such as plowing, to the pocket gophers nestled in their burrows. But a tailored rule shields from liability any "accepted agricultural or horticultural (farming) practices" as long as soil disturbance does not penetrate deeper than a foot.² That provides a clear standard for both farmers and regulators to track and allows agricultural activities to coexist with species recovery.

The wildlife agencies are cash poor but expertise rich. The landowners may be cash poor but habitat rich. But when they agree on certain practices and places where commercial activities can coexist with threatened animals, the door to collaboration opens. My research on the 4(d) program shows that it can promote collaborative conservation rulemaking in several ways, including:

- Rewarding with liability shields those who conserved habitat before listing triggered the ESA's prohibitions
- Encouraging prospective, good-faith collaborations to promote more habitat conservation
- Clearly laying out what will be required for a collaborative, tailored rule to make net contributions to species recovery
- Working closely with states so that land-use plans reflect species conservation goals
- Recalibrating collaborations in response to how well species respond to anticipated recovery and harm-reducing tactics

¹ R.L. Fischman, V.J. Meretsky, M. Castelli 2021, [*Collaborative Governance under the Endangered Species Act: An Empirical Analysis of Protective Regulations*](#), Yale J. Regulation 38: 976-1058 (2021).

² 50 C.F.R. § 17.40(a).

- Actively enforcing tailored restrictions to prevent free riders from benefiting without contributing to collaborative species recovery

Paradoxically, less stringent take rules may promote more conservation for two reasons. First, takes of individual animals or specific patches of habitat do not necessarily impair recovery, which is measured by populations and habitat over a wide area. The bargain to allow some take in exchange for maintenance of key habitat advances the goal of the ESA. Second, relieving a strict ban on all individual animal takes in exchange practice-based standards is a bargain that puts aside difficult to detect and seldom enforced takes. More easily monitored practices may take individuals. But, if designed right, they can compensate by reducing the threats to species populations. Congress discovered this second approach early on in pollution control law, when it adopted practice-based standards (often best-technology standards) and sidelined ambient environmental standards that required tracing an action to some measurable harm in the air, water, or land.

My research revealed that almost three-quarters of 4(d) protective regulations substitute practice-based limitations for difficult-to-detect proximate consequences of an activity. In that respect, collaborative governance transforms the ESA from a statute that prohibits biological entities from crossing invisible ecological thresholds (i.e., harm, jeopardy, recovery impairment) into a regulatory program insisting on best practices. Greater compliance with collaboratively crafted, practice-based conservation requirements may improve the prospect for recovery, even if they are less stringent than the standard statutory prohibitions. That is a paragon of the “win-win” scenario often promised by supporters of collaborative governance.

There are many other collaboration tools evident in 4(d) rules, including cooperative federalism. But that hardly exhausts the possibilities. In a compendium of well-documented recommendations pulled together by Lowell Baier and Jerry Organ in a book due out later this year, there are scores of tools and examples drawn from almost every ESA program.³ I oppose these CRA resolutions because they move the guideposts that incentivize the difficult work of collaboration.

Decades of research by Steven Yaffee and Julia Wondolleck demonstrate that successful conservation collaborations depend on “legal structures that establish management bottom lines” for conservation goals. In about half of the hundreds of conservation collaborations they he studied, the ESA served as the “regulatory driver” of stakeholder cooperation.⁴ The stringent legal mandates create collaboration incentives to avoid more drastic outcomes (e.g., an endangered rather than a threatened listing).

The collaborative governance literature teaches that behind the tentative successes, promising approaches, and skepticism that surround protective regulations is the need to craft incentives. Congressional joint resolutions that relieve the private sector of responsibilities for recovering imperiled species would reduce the motivation for participating in collaborations either to avoid

³ L.E. Baier & J.F. Organ (eds.) forthcoming 2023, *The Codex of the Endangered Species Act: The Next Fifty Years* Vol. II (Rowman & Littlefield).

⁴ Steven L. Yaffee, *Collaborative Strategies for Managing Animal Migrations: Insights from the History of Ecosystem-Based Management*, 41 *Environmental. Law* 655, 677 (2011).

listing or to recover already listed species. Flexibility to tailor rules must be constrained to avoid creating a carte blanche for continuing activities that thwart conservation. But collaborative rules must also offer some certainty to the regulated community that it can shoulder its share of the costs associated with recovery.

This subcommittee does not appropriate, but it can foster better frameworks for conservation collaborations. Using the CRA to fix the ESA is like using a sledgehammer to restore habitat, or in Aldo Leopold's formulation "remodeling the Alhambra with a steam-shovel." A disapproved rule "shall be treated as though such rule had never taken effect." Moreover, a disapproved rule "may not be reissued in substantially the same form, and a new rule that is substantially the same ... may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution."⁵ The CRA does not define the scope of "substantially the same" or state who should make such a determination. But it would constrain the Services from refining their rules (especially the one related to critical habitat) in response to new information or to conform to a textual reading of the ESA. In some cases (such as the reclassification of the northern long-eared bat), the CRA would set up a conflict between the congressional mandate not to issue a "substantially the same" rule and a court order.

II. Three sets of rules affected by the bills under consideration in this subcommittee hearing

A. Habitat Rule

H.J.R. 46 would express congressional disapproval to invalidate the 2022 repeal of the 2020 final rule defining "habitat" under the ESA. The 2020 rulemaking attempted to fill the regulatory gap noted by the Supreme Court in *Weyerhaeuser Co. v. United States Fish & Wildlife Service*.⁶ In that case, the Supreme Court held that the FWS could not designate critical habitat until it first determined that an area could be considered habitat. The 2020 rule defined "habitat" for the purpose of designating "critical habitat" as the "setting that *currently or periodically* contains the resources and conditions necessary to support one or more life processes of a species."⁷ The definition would appear to exclude areas converted to agriculture or silviculture, such as the land at issue in *Weyerhaeuser*. It excludes many areas needed for species to adapt to climate change.

But the bigger problem with using the CRA to revive the 2020 rule is its direct conflict with the text of the ESA. Congress defined critical habitat as both occupied and unoccupied areas. Occupied areas are limited to places that possess "physical or biological features essential to" the species' recovery. But unoccupied areas are not similarly constrained. They are to be designated if they "are essential for the conservation of the species."⁸ By excluding the conditions of biological or physical features from the unoccupied component of critical habitat, Congress recognized the widely understood conservation fact that most species may not be recovered from the brink of extinction without the creation of new habitat to which they can disperse (or be

⁵ 5 U.S.C. § 801(b)(2).

⁶ 139 S. Ct. 361 (2018).

⁷ 85 Fed. Reg. 81411 (emphasis added).

⁸ 16 U.S.C. § 1532(5)(A).

translocated). The unoccupied habitat component of critical habitat aims to secure such new habitat for recovery.

Therefore, any regulatory definition of habitat (such as a restored 2020 rule) that excludes unoccupied habitat not currently or periodically containing physical or biological features essential to recovery is contrary to the ESA, which is clear that critical habitat consists of both occupied habitat containing those features but also unoccupied habitat without them. A court, especially one applying a textualist approach to statutory interpretation and one disfavoring the Chevron doctrine, would likely remand the 2020 rule to comply with the ESA. Such a legitimate judicial action would create a trap for the United States, which would be locked into the contradictory mandates of a court order and the CRA prohibition on promulgating a rule “substantially the same”⁹ as the one disapproved by Congress.

I disagree with the 2022 rule’s view that a regulatory definition of habitat would have little or no practical value. The FWS correctly points out that the scientific literature contains a diversity of definitions for habitat. Scientists define habitat differently depending on the type of species to which it applies, the geographical scale, the biome, and the purpose for which they apply it. Nonetheless, the Supreme Court’s *Weyerhaeuser* decision does add an additional, implicit step to critical habitat designation not evident from the text of ESA section 4. The practical value of even a generic rule defining habitat is that courts would defer to a capacious definition under the Supreme Court’s Chevron precedent. If such a generic definition had been part of the Code of Federal Regulations when the FWS had designated the critical habitat for the dusky gopher frog, the Court may well have decided the case differently. Because a CRA disapproval would prohibit “substantially the same” modification to the 2020 habitat definition, this bill would lock in a regulatory framework that would prevent federal listing agencies (or, at least NOAA) from complying with Congress’ critical habitat mandate.

Conservation collaborations & funding, such as the ones I discuss in Part I (above) better address the inequities of critical habitat designation in unoccupied areas.

B. Northern Long-eared Bat Reclassification

HRJ 49 would exercise CRA disapproval of the rule reclassifying the northern long-eared bat from threatened to endangered. My interpretation of the effect of this bill would be that it would restore the bat to its prior threatened listing. Such an exercise of the CRA would place the FWS in a Kafkaesque bind where the CRA reinstates a threatened listing already found by a federal court to be arbitrary and capricious. *Center for Biological Diversity v. Everson* held that the threatened listing failed to fully consider the extinction risk in the most significant portion of the bat’s range and improperly constrained its analysis of the foreseeable future.¹⁰ The court stated that the ESA requires the Service to “look not only at the foreseeability of threats, but also at the foreseeability of the impact of the threats on the species.” For the bat, this would require consideration of the controllable threats posed by habitat loss and logging in combination with the unconstrained, contagious disease sweeping through the species. The court also emphasized the importance of cumulative impacts in conservation. In other words, the Services must

⁹ 5 U.S.C. § 801(b)(2).

¹⁰ 435 F. Supp. 3d 69 (D.D.C. 2020).

consider all sources of extinction risk—not just the primary factor driving imperilment. As a result of these problems with the threatened listing, the court remanded the rule but did not vacate the “threatened” listing decision. Instead, it ordered the FWS to make a new listing decision consistent with the decision. The 2022 rule did respond to the problems in the threatened listing identified by the court. If a CRA disapproval is enacted, then the 2022 reclassification would be treated as if it were never promulgated. That would put the United States in violation of the court’s decision. Because the CRA prevents promulgation of a rule “substantially the same,” it is not at all clear how the FWS could comply with the judiciary’s order.

The northern long-eared bat is a peculiar choice for CRA disapproval for another reason. Many of the activities not subject to prohibition in the threatened listing’s 4(d) protective regulations appear in the 2022 endangered listing as actions unlikely to result in a violation of section ESA 9. Although not an absolute shield from liability, even the endangered listing provides landowners and livestock graziers reassurance that their enterprises will not be significantly impaired—especially given the rarity of incidental take prosecutions. I discuss the effectiveness of substituting activity-based constraints for the stricter ESA section 9 take prohibition in Part I of this testimony (above).

C. Lesser Prairie-Chicken DPS listings and 4(d) protective regulations

HJR 29 would exercise CRA disapproval of a set of three rules that: list the southern distinct population segment (DPS) of the lesser prairie-chicken as endangered, list the northern distinct population segment (DPS) of the lesser prairie-chicken as threatened, and create an ESA section 4(d) protective regulation. By the time the FWS listed the southern DPS, it was too late to qualify for threatened listing. As discussed above, one of the reasons why funding increases to state wildlife agencies is crucial is to address species of greatest conservation need before they decline to the brink of extinction. Similarly, increased listing appropriations for the FWS would facilitate earlier listing, before a species on the brink is no longer abundant enough to lose out on the conservation collaborations, including those incentivized by protective regulations under ESA section 4(d).

The FWS listed the northern population before it declined to the point where there was little room for trade-offs of bargains (as is the case in the south portion of the species’ range). The northern DPS rule sets out incentives to promote better conservation practices in exchange for relief from the incidental take prohibition. These include routine agricultural practices on existing cultivated lands, prescribed fire, and grazing pursuant to a site-specific management plan developed by a FWS-approved party and revised every five years. The grazing provision is especially important to ensure survival of the LPC’s grassland habitat.

HJR 29 would undermine the conservation benefits of the private-public partnerships that undergird the northern DPS 4(d) rule. It would also undermine the reward of liability relief offered to land managers who have agreed to conduct their enterprises in a manner consistent with prairie-chicken conservation. The result would likely be worse habitat-shaping practices and declines in the recovery prospects for the two DPSs.

III. Conclusion

The most effective step Congress could take to improve the track record of the ESA and reduce conflicts about its application is to enact comprehensive biodiversity protection legislation. Most declining species in the United States are *not* on the brink of extinction. A conservation program for sustaining these species could succeed with much greater flexibility than the ESA. The ESA often demands modification of commercial activities because we do not take reasonable measures until species are at a relatively high risk of extinction. If we had a set of programs to slow unsustainable practices before biodiversity reached the point of potential collapse, then we would avoid many of the train wrecks that have tarnished the image of the ESA. It is a program of last resort, and we ought to rely less on the ESA and more on preventive biodiversity health initiatives to address ecological integrity.

For instance, it can be difficult to promote both economic development and species protection when very little habitat remains. The larger the area, the more feasible trade-offs become. Early planning, before every last scrap of habitat is needed for a species to cling to existence, enables more flexibility and can distribute the costs of species protection more evenly. Some candidate conservation agreements include this kind of flexible approach, but they tend to be developed when it is too late to realize their potential because species populations are too small. We need legislative incentives to engage in such planning before a species is on the verge of listing.¹¹

Short of comprehensive reform and better funding of state & federal wildlife agencies, this subcommittee should support the existing ESA tools that spark collaborative conservation. Collaborative governance is a kind of informal contracting for public goods among stakeholders where enforceable rules circumscribe the negotiating domain. One tool is the widely noted incidental take permit program with its associated habitat conservation plans. The bills at issue before the committee today bear more directly on another key ESA tool, the 4(d) protective regulations that set ground rules for ongoing collaborations in which people who control habitat can advance conservation in exchange for liability shields from ESA section 9 prohibitions.

¹¹ R.L. Fischman, 2004, *Predictions and Prescriptions for the Endangered Species Act*, Environmental Law 34: 451.