

**Testimony of Gary Frazer, Assistant Director for Ecological Services
U.S. Fish and Wildlife Service
U.S. Department of the Interior
Before the House Natural Resources Subcommittee on Water, Wildlife, and Fisheries
On**

H.J.Res.49, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the United States Fish and Wildlife Service relating to “Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-Eared Bat”; H.J.Res.29, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the United States Fish and Wildlife Service relating to “Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status With Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment”; and H.J.Res.46, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Marine Fisheries Service relating to “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat”.

April 18, 2023

Introduction

Good morning, Subcommittee 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 three bills related to the Endangered Species Act (ESA).

For more than 150 years, the Service has collaborated with partners across the country and around the world to conserve, protect, and enhance fish, wildlife, plants, and their habitats. To fulfill our mission of conserving our Nation’s natural resources, the Service implements a variety of environmental laws enacted by the Congress, including the ESA. The ESA, a foundational conservation law that plays an integral role in preventing the extinction of imperiled species, promoting recovery of wildlife, and conserving their habitats, turns 50 years old this year.

The purposes and goals of the ESA are more relevant than ever. Congress’ passage of the ESA 50 years ago was forward looking and provided critical tools to address the environmental challenges we face today. The planet is in the midst of an extinction crisis driven by human activities on the planet. As the human population has expanded, the extinction crisis has also grown. The crisis is accelerated by climate change and invasive species, which are making many areas of historical habitat for plants and animals unsuitable for their continued survival. Scientists estimate that as many as 1 million species are in danger of extinction, many within decades.¹ Recovering species and preventing their extinction will require innovative, proactive, science-based policies and

¹ IPBES (2019): Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. S. Díaz, J. Settele, E. S. Brondízio, H. T. Ngo, M. Guèze, J. Agard, A. Arneth, P. Balvanera, K. A. Brauman, S. H. M. Butchart, K. M. A. Chan, L. A. Garibaldi, K. Ichii, J. Liu, S. M. Subramanian, G. F. Midgley, P. Miloslavich, Z. Molnár, D. Obura, A. Pfaff, S. Polasky, A. Purvis, J. Razzaque, B. Reyers, R. Roy Chowdhury, Y. J. Shin, I. J. Visseren-Hamakers, K. J. Willis, and C. N. Zayas (eds.). IPBES secretariat, Bonn, Germany. 56 pages. <https://doi.org/10.5281/zenodo.3553579>

conservation actions that address the growing impacts from habitat loss, climate change, and invasive species before it is too late. The ESA is a critical tool in helping to conserve species before declines become irreversible.

The ESA helps protect some of the least known and some of the most iconic species in our Nation, including those discussed in legislation today, the northern long-eared bat and the lesser prairie-chicken. Bats are critical to healthy, functioning natural ecosystems and contribute at least \$3 billion annually to the U.S. agriculture economy through pest control and pollination. The northern long-eared bat, formerly one of the most commonly encountered bats during surveys in the eastern U.S., is found in 37 states in the eastern and north central United States, the District of Columbia, and all Canadian provinces from the Atlantic Coast west to the southern Northwest Territories and eastern British Columbia. These bats mostly spend the winter hibernating in caves and abandoned mines. During summer, northern long-eared bats roost alone or in small colonies underneath bark or in cavities or crevices of both live and dead trees. They emerge at dusk to fly primarily through the understory of forested areas, feeding on insects. White-nose syndrome, the disease driving their decline, is caused by the growth of a fungus that sometimes looks like white fuzz on bats' muzzles and wings. The fungus thrives in cold, dark, damp places and infects bats during hibernation. White-nose syndrome, which has been confirmed in 38 states and eight Canadian provinces, is decimating cave-dwelling bat species like the northern long-eared bat.

The lesser prairie-chicken is emblematic of the grasslands of the southern Great Plains, a treasured and storied American landscape of great importance to the people who call the area home. It is also home to hundreds of other wildlife species such as scaled quail, pronghorn and mule deer that share the lesser prairie-chicken's habitat. Once numbering in the hundreds of thousands (some have estimated historical abundances to be in the millions) across nearly one hundred million acres, lesser prairie-chicken populations have declined drastically as compared to historical estimates due to habitat loss and fragmentation. It has been estimated that lesser prairie-chicken habitat has diminished across its historical range by between 83 to 90 percent. The prairie-chicken's decline, and the decline of many other species of grassland birds, serves as a wake-up call for all who value these lands and wish to see them conserved for future generations.

Another important aspect of the ESA is identifying the critical habitats essential for the recovery of imperiled species. This is particularly important as habitat loss or degradation is a key threat for many species that face extinction. A critical habitat designation describes those specific areas that are essential to the conservation of the species and that may need special management or protection. Critical habitat designations affect only Federal agency actions or federally funded or permitted activities. Critical habitat designations do not affect activities by private landowners if there is no Federal "nexus"—that is, no Federal funding or authorization. It is the responsibility of Federal agencies to ensure that actions funded, permitted, or conducted by them do not destroy or adversely modify designated critical habitats.

We appreciate the Subcommittee's interest in the ESA and in the Service's work to implement the law. We offer the following comments on the three ESA-related bills under consideration today and look forward to discussing our views with the Subcommittee.

H.J.Res.49, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the United States Fish and Wildlife Service relating to "Endangered and Threatened Wildlife and Plants Endangered Species Status for

Northern Long-Eared Bat”

H.J.Res.49 states that Congress disapproves the rule submitted by the Service on “Endangered and Threatened Wildlife and Plants Endangered Species Status for Northern Long-Eared Bat” and that the rule shall have no force or effect.

The Service listed the northern long-eared bat as a threatened species in 2015, and a 4(d) rule was finalized in 2016. In 2021, following litigation against the Service, the Service was ordered to reconsider the previous listing decision. On November 30, 2022, after updating the species status assessment and completing the rulemaking process under the Administrative Procedure Act (APA), the Service published in the Federal Register the final rule to reclassify the northern long-eared bat from threatened to endangered under the ESA.

The Service completed an extensive review of changes in the bat’s status and threats since the 2015 rule, and found that white-nose syndrome – the overwhelming threat to the species – now affects nearly all of the bat’s populations. White-nose syndrome has spread across approximately 79% of the species’ entire range and is expected to affect 100% of the species’ range by the end of the decade. Data indicate white-nose syndrome has caused estimated declines of 97 to 100% in affected northern long-eared bat populations. Given the increasing threat of this disease, the bat now meets the definition of an endangered species, i.e., in danger of extinction throughout all or a significant portion of its range.

The Service has a strong foundation in place for working with stakeholders to conserve listed bats while allowing economic activities to continue to occur in compliance with the ESA. Since the species was listed as threatened in 2015, the Service has approved more than 22 habitat conservation plans (HCPs) that allow wind energy and forestry projects to proceed after minimizing and mitigating their impacts to northern long-eared bats. Many of the protective actions we have taken since the species was listed as threatened will continue to be relevant to the conservation of the species now, and more attention and focus will be directed to combatting white-nose syndrome, managing the risk to surviving populations, and assisting landowners and developers in establishing ESA compliance.

After careful consideration, the Service published a notice in the Federal Register delaying the effective date of the final rule from January 30, 2023, to March 31, 2023. This delay enabled the Service to refine interim guidance and tools to help stakeholders transition to the reclassification from threatened to endangered. On March 6, 2023, the Service made these materials available on our website, which include an interim Section 7 framework, a determination key, interim guidance for wind energy operations, and interim guidance for forest habitat modification. Projects subject to section 7 consultation under the ESA can be screened through the determination key, and formal consultation, if necessary, can begin through the Interim Consultation Framework. The interim wind guidance, interim forest habitat modification guidance, and interim Section 7 framework will be in place until April 1, 2024. The Service expects to work on final tools and guidance over the next year.

Simultaneously, the Service leads the collaborative response to white-nose syndrome in the United States, coordinating with over 150 partnering agencies, organizations, and institutions to implement the national response plan. Also, the Service continues to support research through annual grant

programs and to develop management strategies to reduce impacts to bats from the disease. The Service has awarded more than \$46 million to states, tribes, federal agencies, research institutions, and nongovernmental organizations collaborating to advance our knowledge and tools available to help fight the disease. Through these efforts, promising treatments have emerged aimed at slowing disease spread and improving survival of bats.

The Administration opposes H.J.Res. 49. The Service has carefully followed the science, the ESA process, and the Administrative Procedure Act (APA). The northern long-eared bat clearly meets the definition of an endangered species, and its designation as endangered is an alarm that we all need to work to prevent it from going extinct. We believe that the administrative rulemaking process, including public participation, prescribed by statute and informed by the best scientific and commercial data available, is the best and most responsible method for determining species that warrant protection under the ESA. This legislation would circumvent that longstanding statutory process.

H.J.Res.29, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the United States Fish and Wildlife Service relating to “Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status With Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment”

H.J.Res.29 states that Congress disapproves the rule submitted by the Service relating to “Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status With Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment” and that the rule shall have no force or effect.

The lesser prairie-chicken became a candidate for listing under the ESA in 1998 and was listed as a threatened species in 2014. The listing was vacated in 2015 following a lawsuit. In September 2016, the Service received a new petition to list the lesser prairie-chicken as endangered, and in November 2016, made a 90-day petition finding that the petition provided substantial information that the petitioned action may be warranted.

On November 25, 2022, the Service published a final rule listing two Distinct Population Segments (DPSs) of the lesser prairie-chicken under the ESA. The final rule listed the Southern DPS of the lesser prairie-chicken as endangered and the Northern DPS as threatened. This decision was made after reviewing the best available scientific and commercial information regarding past, present, and future threats, ongoing conservation efforts, and more than 30,000 public comments received during the public comment period and two virtual public hearings.

The Southern DPS of the lesser prairie-chicken is continuing to experience ongoing habitat loss and fragmentation, and additional threats from influence of extreme weather events, particularly droughts. The Southern DPS currently has low resiliency, redundancy, and representation and is particularly vulnerable to severe droughts due to its location in the drier and hotter southwestern portion of the range. Because the Southern DPS is currently at risk of extinction, we listed it as endangered.

For the Northern DPS, habitat degradation, loss, and fragmentation are the primary threat to the lesser prairie-chicken. While overall resiliency in this DPS has been reduced as compared to historical conditions, the Northern DPS has enough redundancy and resiliency to not be currently in danger of extinction. However, based upon our projections of additional habitat loss and fragmentation in the future, the species is likely to become endangered in the foreseeable future and thus meets the definition of a threatened species.

As part of the final listing determination, the Service also announced a rule for the management of the Northern DPS under Section 4(d) of the ESA. The 4(d) rule is designed to conserve the species while allowing greater flexibility for landowners and land managers. The 4(d) rule for the Northern DPS provides that farmers can continue their routine agriculture activities on existing cultivated lands. In addition, it recognizes the importance of proper grazing management and allows impacts to the species for those producers who are following a prescribed grazing plan developed by a qualified party approved by the Service. Lastly, the 4(d) rule provides an exception for prescribed fire for the purposes of grassland management. For the oil and gas industry, most of the range is covered by both the approved Oil and Gas Habitat Conservation Plan and the Western Association of Fish and Wildlife Agencies' Candidate Conservation Agreement with Assurances. This means companies have more than one option for receiving streamlined ESA compliance if they need it.

The states, the Service, and other partners have been working to conserve lesser prairie-chicken for over 20 years and have developed conservation tools and plans, including Candidate Conservation Agreements with Assurances (CCAA) and Habitat Conservation Plans (HCP), which provide streamlined ESA compliance options for all sectors. We will continue to work collaboratively with all our partners to conserve the lesser prairie-chicken.

After careful consideration, the Service published a notice in the Federal Register delaying the effective listing date by 60 days, from January 24, 2023, to March 27, 2023. This extension allowed more time for interested parties to enroll in Service-approved conservation plans, such as CCAAs and HCPs. This delay also allowed additional time for the Service to work with partners and stakeholders on implementation of the grazing provision of the 4(d) rule for the Northern DPS and provide interested parties guidance on how to evaluate the need to participate and understand their options for doing so. During this time, the Service and the Natural Resources Conservation Service (NRCS) continued to work together to ensure that grazing plans written by NRCS within the range of the lesser prairie-chicken are sufficient to establish compliance under the ESA. The Service continues to work with stakeholders and partners to identify and approve parties for developing grazing plans under the 4(d) grazing provision for the Northern DPS.

The Administration opposes H.J.Res.29. The Service has fulfilled our statutory responsibilities to use the best available scientific and commercial data in making determinations regarding the lesser prairie-chicken. This legislation would essentially side-step the rulemaking process under the ESA. We believe that the administrative process prescribed by the ESA and the APA, including public participation, is the best path for determining species that warrant protection under the ESA.

H.J.Res.46, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Marine Fisheries Service relating to “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat”

H.J.Res.46 states that Congress disapproves the rule submitted by the National Marine Fisheries Service (NMFS) relating to “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat” and the rule shall have no force or effect. While the Service is aware that the legislation refers to NMFS, the Service jointly promulgated this rule with NMFS.

On January 20, 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. In support of [E.O. 13990](#), a “Fact Sheet” was issued that set forth a non-exhaustive list of specific agency actions that agencies are required to review to determine consistency with the policy considerations articulated in section 1 of the E.O. Among the agency actions listed on the Fact Sheet was the Service’s and NMFS’ December 16, 2020, final rule promulgating a regulatory definition for the term “habitat” under the ESA. Following the Service’s and NMFS’ review of this rule, we determined it was unclear and confusing and inconsistent with the conservation purposes of the ESA, and we subsequently published a proposed rule to rescind it. The Service and NMFS solicited public comments on the proposed rule and extended the deadline for submission of public comments.

The Service’s and NMFS’ June 24, 2022, final rule rescinding the 2020 rule concluded that codifying a single definition in regulation could impede the agencies’ ability to fulfill their obligations to designate critical habitat based on the best scientific data available. Further, we stated that it is more appropriate, more consistent with the purposes of the ESA, and more transparent to the public to determine what areas qualify as habitat for a given species on a case-by-case basis using the best scientific data available for the particular species.

The Administration opposes H.J.Res.46. The Service and NMFS followed the law in promulgating this rule rescinding the 2020 habitat rule. We believe that the administrative process prescribed by the ESA and the APA, including public participation, is the best path for revising our implementing regulations under the ESA.

Conclusion

Although we oppose the three bills being considered today, we appreciate the Subcommittee’s interest in the ESA and in the Service’s work to implement this critical conservation law.

Both northern long-eared bats and lesser prairie-chicken are in serious trouble and at risk of extinction, either now or in the foreseeable future. Designations of critical habitat play an important role in the conservation and recovery of many imperiled species. We are committed to following the administrative processes laid out under the ESA and the APA. The protections of the ESA are critical for the future of these species and the ecosystems upon which they depend.

We look forward to continued communication with the Subcommittee regarding the recovery process and status for northern long-eared bats and lesser prairie-chickens, designation of critical habitat, and all aspects of the Service’s work.

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