OVERVIEW OF HOUSE BILLS IN THE 118TH CONGRESS UNDERMINING THE ENDANGERED SPECIES ACT (MARCH 17, 2023)

The Water, Wildlife and Fisheries subcommittee of the House Resources Committee is holding a legislative hearing on March 23, 2023, to consider four bills that make up part of a broader package of proposed laws introduced in the 118th Congress by various members to undermine the Endangered Species Act (ESA).[1] Three bills that are the subject of the subcommittee hearing (H.R. 764, H.R. 1245, and H.R. 1419) would delist iconic American species – the gray wolf and the grizzly bear – depriving them of the protections of the ESA on a political basis. A fourth bill, H.R. 200, would override a judicial decision interpreting the ESA in order to exempt the Forest Service and the Bureau of Land Management from considering the effects of their land management plans on newly listed species or newly designated critical habitat. H.R. 200 will be considered in a separate March 23. 2023 hearing being held by the House Federal Lands Subcommittee.

Other bills pending in the Water, Wildlife and Fisheries subcommittee would hamstring the ability of the United States to participate in international conservation efforts for imperiled species (H.R. 94), allow the Department of Defense and its many industrial contractors to freely kill endangered and threatened species and destroy their habitat (H.R. 97), create one-sided procedures to delist species without judicial review and intimidate citizens from proposing species for listing (H.R. 99), force delisting and permanently prohibit future listing of the lesser prairie chicken (H.R. 248), create burdensome and duplicative barriers to listing species and allow the use of faulty science in listing decisions (H.R. 518), and force the Secretary to accept artificially propagated animals as the equivalent of wild populations for all purposes under the ESA, destroying the central purpose of the Act – to protect the ecosystems on which endangered and threatened species depend (H.R. 520).

The ESA is America's most effective law for protecting wildlife in danger of extinction. It is effective largely because it is a science-based law. Ninety-five percent of listed species have survived and many more, such as the iconic Bald Eagle, have been set on a path to recovery. At a time when extinction rates are over 100 times higher than normal, we should be working to strengthen, not weaken, the nation's best tool for helping to stave off the tragedy of extinction.

[1] The hearing will also consider a bill introduced by Rep. Suzanne Bonamici (D-OR) that would amend the Save Our Seas Act 2.0, 33 U.S.C. §4201, to improve management of the Marine Debris program administered by the National Atmospheric and Oceans Administration.

The ESA also is broadly popular with the American people. Surveys have shown repeatedly that strong majorities of Americans – from 80 to 90% -- support the ESA.

ESA Bills Being Considered at Subcommittee Hearing March 23

1. H.R. 764: Trust the Science Act (Boebert R-CO)

The Trust the Science Act, H.R. 764, directs the Secretary of the Interior to reissue the final rule published November 3, 2020, delisting the gray wolf within 60 days of enactment. The bill bars judicial review of the Secretary's action delisting the wolf.

The gray wolf is an iconic keystone species that plays a vital role in keeping ecosystems healthy. Gray wolf populations in the United States were decimated by decades of predator control programs, as well as loss of habitat and prey. Since receiving protection under the ESA in 1974, the gray wolf has begun a comeback, but remains far from recovered. The rule that H.R. 764 would reinstate was hastily issued by the U.S Fish and Wildlife Service (FWS) at the end of the Trump administration to delist gray wolves in 44 states. The rule was challenged by conservation organizations and vacated by a federal district court in February 2022. The court found that the delisting decision improperly relied on two core populations to delist wolves nationally, failed to provide a reasonable interpretation of what constitutes a "significant" portion of the species' range, ignored the fact that the ancestry of West Coast wolves was distinct from northern Rockies wolves, and did not consider the impact of lost historical range on gray wolves.

By forcing the reinstatement of the Trump administration's scientifically indefensible delisting rule, the ironically named "Trust the Science Act" undermines the scientific integrity of the ESA. The intent of the bill to shield the FWS's flawed scientific reasoning from inquiry is made clear by the bill's preclusion of judicial review, undermining the rule of law that holds government officials accountable in the courts.

2. H.R. 1245 Delisting Greater Yellowstone Population of Grizzly Bears (Hageman R-WY)

H.R. 1245 requires the Secretary to reissue a rule promulgated by the FWS in 2017 delisting the Greater Yellowstone population of grizzly bears and held unlawful by the U.S. Court of Appeals for the Ninth Circuit. H.R. 1245 also bars judicial review of the reissued rule. The bill would undermine the Ninth Circuit's ruling and preempt the scientific process initiated only a month ago by the FWS to consider whether the grizzly bear populations in the Greater Yellowstone Ecosystem (GYE) and Northern Continental Divide Ecosystem (NCDE) should be delisted under the ESA. 88 Fed. Reg. 7658 (February 6, 2023). The FWS found that petitions for delisting filed by the States of Montana and Wyoming presented substantial information indicating that delisting of the grizzly bear in those regions may be warranted, triggering a 12-month process of evaluation of current scientific information and regulatory programs to determine whether to remove the GYE and NCDE populations. Importantly, the FWS identified significant issues regarding how the states would manage grizzly bears if they were delisted,

including concerns about recent legislation in Montana and Idaho that could lead to unrestricted mortality from hunting and predator control. The FWS also stated that if it initiates a rulemaking process to delist the GYE or NCDE populations, it will consider the effects of any proposed rule on the recovery of grizzly bears in the lower-48 listed entity outside of the GYE and NCDE.

The grizzly bear is an iconic species of the American west, and its survival is one of the success stories of the ESA. The grizzly bear's decline from habitat loss and suppression through hunting and heavy-handed predator control programs was one of the factors prompting enactment of the ESA, and it was listed as threatened soon after enactment. The FWS has identified six recovery areas in the United States; the bear is primarily found today in four geographic areas of the United States, including substantial populations in the GYE and NCDE. The grizzly bear populations in those locations is stable and growing, but conservationists remain concerned about the geographic and genetic isolation of those populations, the threat of increased human-induced mortality through hunting or predator control if they were delisted and management returned to the states of Montana, Wyoming, and Idaho, and the effects of delisting particular populations on grizzly bears in the rest of the lower-48 states.

The FWS attempted to delist the GYE population of grizzly bears in 2017. Its delisting rule, which H.R. 1245 would reinstate legislatively, was vacated by a federal district court in 2018, and its decision was affirmed by the U.S. Court of Appeals for the Ninth Circuit. *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999 (D. Mont. 2018), *aff'd,* 965 F.3d 662 (9th Cir. 2020). The district court found that the FWS had not sufficiently assessed the effect of delisting the GYE population on the recovery of grizzly bears in the rest of the lower-48 States; that FWS and the states had not committed to recalibrate potential new population estimators in the future to ensure the ongoing applicability of the 2016 GYE Conservation Strategy's mortality limits in the event hunting was authorized following delisting; and that FWS had inadequately analyzed the genetic health of the GYE grizzly bear population. The FWS's newly announced process in response to petitions by Montana and Wyoming will evaluate those issues, among other conservation concerns, to determine whether the bear can now safely and legally be removed from the protections of the ESA.

H.R. 1245 preempts that careful scientific and regulatory review, superimposing Congress's political judgment for that of the expert wildlife service charged with implementing the ESA. By barring judicial review, it precludes the vital check and balance that the courts provide to ensure that agency decisions properly consider the best available science and comport with the law.

3. H.R. 1419 Delisting Northern Continental Divide Population of Grizzly Bears (Rosendale R-MT)

H.R. 1419, like its companion bill H.R. 1245, would force the Secretary to delist the NCDE population of grizzly bears, and would bar judicial review of that action. Like H.R. 1245, H.R.

1419 preempts the FWS's newly initiated scientific and regulatory review that would determine, in accordance with the procedures of the ESA, whether that population of the bear can safely and legally be removed from the protections of the ESA. 88 Fed. Reg. 7658 (February 6, 2023). And, like H.R. 1245, it would deprive the public of the assurance provided by judicial review that the agency's action delisting the NCDE population was scientifically sound and legally proper.

4. H.R. 200: Forest Information Reform Act (Rosendale R-MT)

The Forest Information Reform Act, H.R. 200, would amend the Forest and Rangeland Renewable Resources Planning Act of 1974 and the Federal Land Policy and Management Act of 1976 to exempt the Forest Service and the Bureau of Land Management (BLM) from being required to reinitiate consultation on a land management plan when a new species is listed, critical habitat is designated, or new information concerning a listed species or critical habitat becomes available. The bill seeks to reverse a 2015 decision by the U.S. Court of Appeals for the Ninth Circuit, *Cottonwood Environmental v. U.S. Forest Service,* 789 F.3d 1075 (9th Cir. 2015) ("*Cottonwood*"), which held that the Forest Service must reinitiate consultation on its forest plans where new critical habitat is designated for a listed species.

The National Forest system comprises almost 197 million acres of federally managed forests and grasslands; BLM manages an additional 245 million acres of public lands. Together, the two agencies manage almost 20% of the U.S. land base. The Forest Service and BLM manage their lands through land management plans developed through a public rulemaking process and through project level actions that implement those plans. The agencies consult with the FWS and the National Marine Fisheries Service (NMFS) under Section 7 of the ESA when adopting land management plans to assess whether their plans may affect listed species; they also consult when they propose project-level actions that may affect listed species.

Under FWS and NMFS regulations, federal agencies are required to reinitiate consultation regarding actions over which they retain discretionary involvement or control when:

(1) The amount or extent of taking specified in an incidental take statement is exceeded;
(2) New information on the species or action reveals effects of the action that may affect species or critical habitat in a manner or to an extent not previously considered;
(3) The identified action is sufficiently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or
(4) A new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16. The requirement to reinitiate consultation in these circumstances reflects the continuing obligation of federal agencies under Section 7 of the ESA to "insure" that their actions, including actions being carried out, are not likely to jeopardize the continued existence of any listed species or result in the destruction of their critical habitat.

Applying these regulations, the Ninth Circuit held in *Cottonwood* that the Forest Service must reinitiate consultation with the FWS regarding the effects of forest plans in the Rocky Mountain region on Canada lynx after the FWS designated additional critical habitat for the lynx in the region. The court held that the Forest Service retained discretionary involvement or control over its forest plans, including the ability to amend them to address new circumstances. The *Cottonwood* decision disagreed with a previous decision of the U.S. Court of Appeals for the 10th Circuit, *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1151 (10th Cir. 2007), which had held that forest plans, once adopted, did not constitute federal agency actions that could trigger reinitiation of consultation because they merely established standards and guidance for management rather than directly authorizing project level actions that could affect the environment.[2] These decisions left the Forest Service and BLM with conflicting legal mandates regarding the need for reinitiation of consultation on their land management plans in the Ninth and Tenth judicial circuits where the majority of their lands are located.

In 2018 Congress enacted legislation that modified how the *Cottonwood* decision applies to forest plans and certain BLM land use plans. The FY2018 consolidated appropriations act amended 16 U.S.C. § 1604 to exempt the Forest Service from reinitiating consultation for previously adopted forest plans when new species are listed or critical habitat is designated. This exemption does not apply if 15 years have passed since the forest plan was adopted and 5 years have passed since the FY2018 appropriations bill was enacted (March 23, 2018) or the date of the new species listing or critical habitat designation, whichever is later. Since many forest plans are more than 15 years old, this provision effectively postponed the requirement of reinitiation of consultation for species or critical habitat designations for such plans. It also applies only to certain BLM land use plans (previously adopted plans for Oregon and California Railroad grant lands and Coos Bay Wagon Road grant lands).[3]

---

[2] The Tenth Circuit relied on a 2004 Supreme Court decision, *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*), that had held that BLM was not required to supplement an environmental impact statement under the National Environmental Policy Act (NEPA) to address impacts on roadless areas that exceeded levels anticipated when the agency adopted the land use plan for the area. The Court held in *SUWA* that the agency's action preparing its plan had been completed upon its adoption, and that no major federal action remained to occur to trigger the duty to supplement the EIS. *SUWA* interpreted NEPA, however, not the ESA. Section 7 of the ESA imposes a continuing duty on federal agencies to ensure that their actions do not jeopardize endangered species, and the controlling regulations require reinitiation of consultation regarding a federal agency's actions so long as the agency still has discretionary involvement or control over the action. 50 C.F.R. § 402.16.

[3] The FWS and NMFS amended their ESA implementing regulations in 2019 to, among other things, extend this statutory exemption to all BLM land use plans. Those regulations were remanded by a federal district court on November 16, 2022. *Center for Biological Diversity v. Haaland,* No. 19-cv-05206 (JST) (N.D. CalNov. 16, 2022).

H.R. 200 would greatly expand the statutory exemption created by Congress in 2018. First, the bill extends the 2018 statutory exemption to cover not just the listing of species or designation of critical habitat but also the discovery of new information that reveals that the impacts of land management plans on listed species or critical habitat is greater than understood when the plans were adopted. Second, the bill extends the exemption to all Forest Service and BLM land management plans. Third, the bill discards any time limits on the exemption.

H.R. 200 thus would allow the Forest Service and BLM to blind themselves to the existence of newly listed species or newly designated critical habitat and to ignore new information about the impacts of their land use management plans on existing species or critical habitat, even if such information reveals sharply increased risks to endangered and threatened species. The Forest Service and BLM would continue to be required to evaluate the impacts on species from project level actions that they undertake, but critical land use allocations typically made during the planning process, such as designation of areas with National Forests or BLM land units for logging or other resource extraction or for off-road vehicle use, would escape review under the ESA when new species are listed, critical habitat is designated or new information reveals additional risks to endangered or threatened species, potentially threatening the existence of imperiled species in those areas.

More broadly, the most efficient and effective way for federal land management agencies and the wildlife services to assess the effects of their programs on listed species and critical habitat is at the plan level, where cumulative effects of a land unit's proposed management over a decade or more can meaningfully be assessed and mitigation developed at the planning unit scale. Project level evaluation can then be efficiently tiered to the analysis in the larger plan, minimizing duplicative effort; this tiered approach to environmental reviews is widely accepted and effective under the National Environmental Policy Act. But without consideration at the plan level, the impacts of a multitude of implementing actions – timber sales, road building, oil and gas permitting, off-road vehicle recreation – may be lost in the details of specific decisions, threatening endangered species and their habitat with death by a thousand cuts.

Other ESA Bills Referred to the House Natural Resources Committee

5. H.R. 94: American Sovereignty and Species Protection Act (Biggs R-AZ)

The American Sovereignty and Species Protection Act would prohibit the Secretary from listing species that are not native to the United States, drastically undermining the ESA's commitment to international conservation of imperiled species. Listing foreign species under the ESA provides important protections to such species, including protection against their commercial exploitation in trade and prohibitions on taking such species in the United States or on the high seas, that are critical to international conservation for such species. Listing of foreign species also triggers the authority provided in Section 8 of the ESA for the United States

to provide financial assistance to foreign countries for development and management of conservation programs for such species. Prohibiting the listing of foreign species would thus tie the United States' hands in international conservation.

H.R. 94 also impairs the ability of the United States to engage in international conservation efforts to protect native species. The bill prohibits the use of U.S. financial assistance to acquire lands or waters in a foreign country to aid in international conservation for any listed species, including species that are native to the U.S. but share habitat in other countries (such as jaguar and many species of migratory birds).

Other than inexplicably undercutting the United States' ability to engage in international conservation, the bill may be intended to benefit the operators of hunting preserves in the United States that offer paying customers the opportunity to hunt exotic and often imperiled foreign species. Under Section 9 of the ESA it is illegal to take listed species, including foreign species, in the United States, but if foreign species were barred from being listed they could legally be hunted even though critically imperiled.

6. H.R. 97: Armed Forces Endangered Species Exemption Act (Biggs R-AZ)

The Armed Forces Endangered Species Exemption Act would, as its title indicates, essentially exempt the U.S. military from compliance with the ESA. The bill prohibits the Secretary from designating as critical habitat any military installation or National Guard installation, or any other lands or waters designated for use by the Defense Department – including defense contractors – that the Secretary of Defense deems necessary for training, weapons testing or any other reason. The bill also exempts the Secretary of Defense from consulting under Section 7(a)(2) of the ESA to ensure that Defense Department actions do not jeopardize the continued existence of an endangered or threatened species or result in destruction of critical habitat for such species (regardless of whether the area in question is subject to an integrated natural resources management plan under the Sikes Act). Finally, the bill exempts military personnel – including contractors and even employees of non-military agencies – engaged in national defense-related operations, including research, weapons testing, training, and any action the Secretary of Defense deems necessary to support the Defense Department's mission, from the prohibitions on taking endangered species in Section 9 of the ESA.

H.R. 97 thus carves a huge loophole in the ESA for all manner of military activities, including activities of a multitude of industrial contractors and subcontractors, exposing endangered and threatened species to unrestricted harm and possible extinction. The lands managed by the Department of Defense are an essential component of our nation's biodiversity. The Department of Defense manages approximately 27 million acres of land on 338 military installations. These lands support the preservation of ecologically important native habitats such as old-growth forests, tall-grass prairies, coastal beaches, and wetlands, making military installations a haven for fish, wildlife, and plants, including rare and unique species. Over 400

threatened and endangered species live on DOD-managed lands. Public access to many of these sites is limited due to security and safety concerns, sheltering them from disturbance and development.

There is no evidence that compliance with the ESA threatens the nation's military security. The Department of Defense has long worked, in partnership with the U.S. Fish and Wildlife Service and state wildlife agencies, to conserve fish and wildlife resources, including imperiled species, on military lands. Under the Sikes Act, 16 U.S.C. § 670, the Department of Defense develops and implements integrated natural resources management plans to manage and protect natural resources, including listed species, on military lands. Military lands are already excluded from designation as critical habitat where such plans provide a benefit to listed species. 16 U.S.C. § 1533(a)(3)(B)(i). Exempting the Department of Defense and its many industrial contractors from compliance with the ESA puts our nation's natural legacy at needless risk.

7. H.R. 99: Less Imprecision in Species Treatment Act (LIST) (Biggs R-AZ)

The Less Imprecision in Species Treatment Act ("LIST Act") increases the risk of incorrectly delisting imperiled species while simultaneously deterring the public from petitioning to list other species that are imperiled. 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.[4] The LIST Act, however, directs the Secretary to delist species if the Department of the Interior has produced or 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. However, the FWS and NMFS have long viewed recovery plans as non-binding guidance documents. Moreover, many recovery plans are more than 20 years old, and the recovery goals for at least 130 species inexplicably set recovery goals with *fewer* populations or individuals than existed at the time these species were determined to be at-risk enough to merit protection under the ESA, indicating that many recovery plans are at odds with conservation science.[5] Yet 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

[4] *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432-33 (D.C. Cir. 2012).

[5] https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/conl.12601; https://defenders-cci.org/publication/recovery-plans-need-better-science/

undertaking the notice-and-comment procedures required with 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 (oddly omitting the Department of Commerce, which shares responsibility for implementing the ESA), 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 without a public rulemaking process) and that determination would not be subject to judicial review. By contrast, a decision by the Secretary that finds that the original listing was *not* based on inaccurate, fraudulent or misrepresentative information *would* be subject to judicial review by parties interested in forcing the delisting of the species. These judicial review provisions blatantly stack the odds in favor of wrongly removing protections for threatened and endangered 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. The prospect of a politically driven inquiry into their motives may deter parties from submitting listing petitions that contain legitimate information. There is no evidence of widespread errors in the listing of species or the submission of fraudulent information by petitioners to warrant setting up such intrusive and one-sided processes for invalidation of listings.

8. H.R. 248: Promoting Local Management of the Lesser Prairie Chicken Act (Estes R-KS)

H.R. 248, the "Promoting Local Management of the Lesser Prairie Chicken Act," amends Section 4 of the ESA to prohibit the Secretary from listing any population of the lesser prairie chicken in Kansas, Oklahoma, Texas, Colorado, or New Mexico as threatened or endangered, and directs the Secretary to delist the populations of that species in those states. The lesser prairie chicken is a species in the grouse family that once ranged widely across the Southern Great Plains of the United States. It has lost between 83-90% of its habitat to various forms of development, including oil and gas production, and its population has declined by as much as 99% in some ecoregions as a result. In 2014 the FWS listed the species as threatened under the ESA, but the listing was vacated in 2015 following legal challenges.

On November 25, 2022, the FWS determined that the lesser prairie chicken's range was divided into two distinct population segments (DPSs). 87 Fed. Reg. 72674 (November 25, 2022). It found that the primary threat impacting both DPSs is the ongoing loss of large, connected blocks of grassland and shrubland habitat. The agency determined that the southern population segment in New Mexico and Texas has low resiliency, redundancy, and

representation and is particularly vulnerable to severe droughts due to being located in the dryer and hotter southwestern portion of the range. The FWS accordingly listed that DPS as endangered. The FWS found that the northern population segment in Texas, Oklahoma, Colorado, and Kansas still retained redundancy and genetic and environmental representation across its range, but because it faced continued habitat loss and fragmentation that put it at risk of extinction listed the northern DPS as threatened. *Id.* The agency described the scientific basis for its determinations in an extensive discussion in the published rule. *Id.* 72675-72710. FWS also promulgated a special rule under Section 4(d) of the ESA that allows for continued agriculture, prescribed fire, and grazing in the northern DPS, listed as threatened.

H.R. 248 reverses the FWS's listing decision for the lesser prairie chicken and prohibits the Secretary from ever listing the imperiled bird species again. The bill overrides the scientific and factual findings that underlie the FWS's determination that the species faces an imminent risk of extinction in the southern portion of its range and longer-term risks to its survival in the northern DPS that warrant listing the species. H.R. 248 substitutes Congress's judgment for that of the expert wildlife agency without explanation or rational basis and establishes a terrible precedent for Congressional interference in the science-based conservation of imperiled species under the ESA.

9. H.R. 518: Endangered Species Transparency and Reasonableness Act (McClintock R-CA)

The "Endangered Species Transparency and Reasonableness Act," H.R. 518, 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.

H.R. 518 would also establish burdensome procedural requirements for listing species, requiring the Secretary to publish on the internet and provide to the states all data that are the basis for each proposed listing under the ESA. The FWS and NMFS already must fully describe the basis for any listing in proposed and final rules published in the Federal Register and give actual notice of proposed listing regulations to affected states and counties. 16 U.S.C. § 1533(b)(5). The bill would also create a loophole in its requirements for transparency by exempting information that is subject to state privacy laws, potentially encouraging states to pass laws shielding commercial data from public inspection to appease special interests. Moreover, the bill would attempt to discourage or intimidate the public from challenging agency actions by requiring a broad range of federal agencies to report annual expenditures on ESA-related litigation, including whether any plaintiffs received federal funding, and limiting attorneys' fees for persons suing under the Act by substituting the reduced fees available under the Equal Access

to Justice Act for the Act's longstanding authorization of full market-based fees for prevailing parties.

10. H.R. 520: Artificially Propagated Animals (McClintock R-CA)

H.R. 520 would undermine the central purpose of the ESA – the conservation of the ecosystems upon which endangered species and threatened species depend, 16 U.S.C. § 1531(b) – by prohibiting the Secretary from distinguishing between naturally propagated animals and artificially propagated animals in making determinations under the Act. The bill adds a new Section 14 to the ESA that directs the Secretary to authorize the use of artificial propagation of animals of a species for purposes of any mitigation required under the Act with respect to such species.

Controlled propagation is an essential tool in the conservation of imperiled species, expressly authorized by Section 3(3) of the ESA, 16 U.S.C. § 1532(3). Propagation is used by FWS, NMFS and other conservation agencies to maintain genetic diversity in small, isolated populations, to permit scientific research, to supplement wild populations and to recover depleted populations in secure settings before reintroducing them to the wild. But as the FWS and NMFS noted in adopting a formal policy governing the use of controlled propagation, 65 FR 56916 (September 20, 2010), the central purpose of the ESA is to conserve the ecosystems on which endangered and threatened species depend, and "controlled propagation is not a substitute for addressing factors responsible for an endangered or threatened species' decline." The Services declared that their "first priority" is "to recover wild populations in their natural habitat wherever possible, without resorting to the use of controlled propagation." *Id.* Moreover, as the FWS/NMFS policy makes clear, the use of propagation must be carefully controlled to avoid transmission of disease or genetic release into wild populations that may harm their survival.

H.R. 520 would force the Services to abandon their carefully controlled approach to propagation as a conservation tool, forbidding the Secretary from making any distinction between artificial propagation and natural propagation and requiring approval of artificial propagation whenever mitigation is required under the ESA. Even more alarming, the sweeping language of H.R. 520 would force the Secretary to treat artificially propagated animals as if they were wild in making listing determinations and in determining when species have recovered. Sufficient numbers of fish in a hatchery or of animals in a zoo could, under this bill, preclude listing such species or force their delisting even when they cannot survive in the wild. The bill would thus destroy the central purpose of the ESA – conserving the habitats on which endangered and threatened species depend so that species can thrive in the wild.

11. H.R. 872 Federally Integrated Species Health Act (Calvert R-CA)

H.R. 872, the Federally Integrated Species Health Act ("FISH Act"), transfers authority over anadromous species (fish such as salmon that spawn in fresh or estuarine waters and migrate

to ocean waters) and catadromous species (fish such as eels that spawn in ocean waters and migrate to fresh or estuarine waters) under the ESA from NMFS to FWS. The bill would thus reverse the allocation of responsibility for such species established by Congress when it enacted the ESA (adopting a 1970 reorganization plan implemented by the Nixon administration). 16 U.S.C. § 1533(15) (defining "Secretary" under the Act as including the Secretary of Commerce). Under that original allocation of responsibility, NMFS has administered the ESA with respect to Pacific salmon and most other anadromous and catadromous species for fifty years. It has developed substantial scientific and administrative expertise with respect to such species.

Development interests have for years expressed concerns with NMFS's approach to management of salmon species, contending that NMFS is generally more restrictive than FWS. But there is no basis for their apparent assumption that the FWS would make more lenient decisions than NMFS regarding listing of fish species or the mitigation appropriate for federal agency actions affecting listed fish species. Moreover, the sweeping transfer of all authority over anadromous and catadromous species to FWS would disrupt the functioning of the ESA and impose a sharply increased administrative and scientific burden on FWS. H.R. 872 does not address the resource burdens that it would create for the FWS, which is already stretched thin in carrying out its responsibilities under the ESA.

12. H.R. 1142: (Pfluger R-TX)

H.R. 1142 would amend Section 4 of the ESA to prohibit the Secretary from listing a species if it would cause "significant economic harm" to any State or locality. "Significant economic harm" is not directly defined, but the bill requires that it be determined by considering cumulative economic effects on public land, private land and property values; the provision of water, power or other public services; employment; and revenues available for State and local governments.

By precluding the listing of species based on the economic effects of listing, H.R. 1142 repudiates the ESA's central commitment to scientific integrity. In enacting the ESA, Congress determined that the determination whether a species is endangered or threatened is a scientific question to be resolved *solely* on the basis of the best scientific and commercial data available after taking into account conservation efforts directed at the species. 16 U.S.C. § 1533(b). The word "solely" was added to the phrase "on the basis of the best scientific and commercial data available" during the 1982 amendments to the ESA. *See* H.R. Rep. No. 97-567 (1982) *as reprinted in* 1982 U.S.C.C.A.N. 2807. As explained in the House Report, "[t]he addition of the word 'solely' is intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species." *Id*. at 2820 (emphasis added). Congress was adamant that "economic considerations have no relevance to determinations regarding the status of species . . .." H.R. Rep. No. 97-835, at 20 (1982) (Conf. Rep.), *as reprinted in* 1982 U.S.C.C.A.N. 2860, 2862; *see also id*. at 19 ("The principal purpose of these amendments is to ensure that decisions in every phase of the process pertaining to the listing or delisting of

species are based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions.").

The ESA takes economic effects into account in other aspects of its implementation, including the designation of critical habitat, 16 U.S.C. § 1533(b)(2), and the consultation process under Section 7. 16 U.S.C. § 1536(b)(3)(A) (if jeopardy found, the Secretary shall suggest reasonable and prudent measures that "can be taken" by the federal agency or applicant); *id.* § 1536(e) (authorizing the Endangered Species Committee to grant exemptions where the benefits of an action clearly outweigh the benefits of alternative courses of action consistent with conserving a species or its critical habitat and the action is in the public interest). But the initial determination of whether a species is or is not endangered or threatened is – and should be – a purely scientific determination.

H.R. 1142 would replace that scientific determination of a species' conservation status with a *financial* calculus by the Secretary whether preserving the existence of a species would be too costly. That determination would apparently be made without any consideration of the potential benefits to society of preserving the species. Those benefits may be very large – many of the world's medicines, for example, including drugs that fight cancer and other diseases that impose enormous health costs on society, have been developed from rare and imperiled species. Indeed, the benefits of preserving species may fairly be termed "incalculable," as the U.S. Supreme Court observed in *TVA v. Hill*, 437 U.S. 153, 178-79 (1978), because of "the unknown uses that endangered species might have and the unforeseeable place such creatures may have in the chain of life on this planet."

The ESA's entire structure is based on the honest assessment whether particular species face imminent risk of extinction. To replace that with a one-sided financial calculus about whether protecting a species may be expensive cheapens the commitment the United States made in enacting the strongest conservation law in the world.

13. H.J. Res. 29: (Mann R-KS)

House Joint Resolution 29 would disapprove, pursuant to the Congressional Review Act, the FWS's rule published November 25, 2022, listing two distinct population segments (DPSs) of the lesser prairie-chicken as threatened and endangered, respectively. *See* the discussion provided above regarding H.R. 248.

For more information, please contact Mary Beth Beetham at Defenders of Wildlife, mbeetham@defenders.org, 202-772-0231.