Testimony

of

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before the

**SUBCOMMITTEE ON WATER, WILDLIFE & FISHERIES**
**COMMITTEE ON NATURAL RESOURCES**

**U.S. HOUSE OF REPRESENTATIVES**

on

# THE ESA AMENDMENTS ACT OF 2024 DISCUSSION DRAFT

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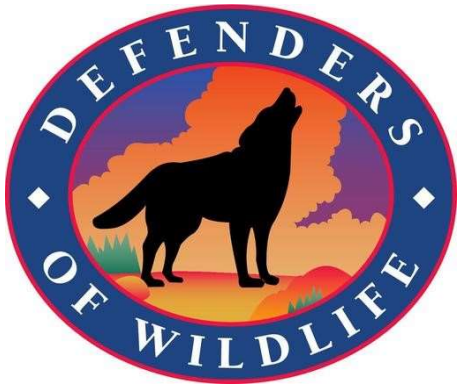

Chairman Bentz, Ranking Member Huffman, and Members of the Subcommittee:

My name is Ellen Medlin Richmond and I am a Senior Attorney with Defenders of Wildlife, a national non-profit conservation organization dedicated to the protection of all native animals and plants in their natural communities. For over 75 years, Defenders of Wildlife has protected and restored imperiled species throughout North America by establishing on the ground programs at the state and local level; securing and improving state, national, and international policies that protect species and their habitats; and upholding legal safeguards for native wildlife in the courts. Defenders recently launched its Biodiversity Law Center and Center for Conservation Innovation to pioneer proactive and pragmatic solutions to enhance the effectiveness of endangered species conservation in the United States. We represent nearly 2.1 million members and supporters throughout the United States.

I have dedicated my career to advocacy for clients—including wildlife that would not otherwise have a voice—in the courts and before federal and state agencies and policymakers. In my current role as a senior attorney at Defenders of Wildlife, I specialize in litigation and policy analysis under the Endangered Species Act (ESA) and ESA regulations. Most recently, I was a leader of Defenders' advocacy surrounding the 2024 revisions to the ESA regulations. I have also worked on a variety of ESA litigation, including litigation aimed at protecting iconic western species such as the lynx, gray wolf, and Mojave desert tortoise, as well as beautiful coastal animals such as the red knot, piping plover, and manatee. Before coming to Defenders of Wildlife, I worked both in private practice, including at the Los Angeles-based law firm Munger, Tolles & Olson, and in the nonprofit sector, at the Sierra Club Environmental Law Program. I began my career as a law clerk for the Honorable Raymond C. Fisher of the U.S. Court of Appeals for the Ninth Circuit, and before that graduated from Stanford with a J.D. and an M.S. in environmental policy. Thank you for inviting me here today to speak about the ESA Amendments Act of 2024.

As I will describe in my testimony, we are facing an alarming and catastrophic worldwide biodiversity crisis, largely driven by humankind. Development, habitat loss, exploitation, pollution, and invasive species now threaten as many as one million species with extinction. These threats are exacerbated by climate change, which is increasingly impacting our planet. To combat these environmental crises, we need to take bold action. This includes fully funding and strengthening the ESA, the visionary law that establishes the nation's commitment to conserving and recovering imperiled species.

The bill before the Subcommittee, the "Endangered Species Act Amendments of 2024," would unfortunately take us in the wrong direction at this critical moment for our planet.

**Responding to a Biodiversity Crisis of Epic Proportions**

The science marshalled over the past few years unequivocally illuminates with stark clarity that this is a pivotal time for wildlife and ultimately, humanity. In 2019, the United Nations Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services released a groundbreaking assessment warning that about one million species are now threatened with extinction.[1] In North

[1] Diaz, S., J. Settele, E. S. Brondizio, et al. 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*. Available at: https://www.ipbes.net/news/Media-Release-Global-Assessment.

America alone, nearly 3 billion birds have disappeared since 1970.[2] Many once-common species have drastically declined, including monarch butterflies and bumblebees, and more than 10 species in the continental United States have been declared extinct in the past decade. This loss of species is driven by the fact that we have altered over 75% of terrestrial environments and 66% of marine environments.[3]

Furthermore, we are losing species faster than ever before in human history, at tens to hundreds of times faster than the normal background extinction rate. Just last year, the U.S. Fish and Wildlife Service delisted 21 U.S. species because they were extinct, a sobering reminder that extinction is possible, and that a strong Endangered Species Act is required to prevent it.[4] These delistings do not show that the ESA failed to prevent extinction, but instead highlight how critical ESA protections are for species teetering on the edge, as the majority of those 21 species were listed too late to benefit from the ESA's protections. When species are listed in time, the ESA works.

The loss of each species weakens the nation's capacity for a strong economy, flourishing human health, national security, and resistance to national disasters, each of which is built upon the foundation of the ecosystem services they provide. Plant and animal species can even offer the potential for lifesaving medicines: As just one of many examples, chemical compounds found in the venom of the rare and protected Gila monster lizard[5] of the American southwest inspired scientists to create the diabetes and weight loss drugs Ozempic and Wegovy.[6]

From the more than five trillion dollars provided by ecosystem services in the United States[7] to forming the backbone of American agriculture[8] in the U.S., nature is inherently important and has a critical role to play in human flourishing. Each species has a critical role, and ours may be the most critical of all: we must be the proactive stewards of all wildlife and their habitats to ensure their persistence as well as our own.

This unprecedented challenge presents an historic moment for conservation and our country—perhaps the most critical one we have ever faced. Our actions now will determine if our planet will sustain our priceless natural legacy – our rich abundance of wildlife and awe-inspiring landscapes – for current and future generations. If we do not act now, the consequences to our society from the loss of species and ecosystem services will be dire.

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[2] Rosenberg, L. V. et al. 2019. "Decline of the North American avifauna." Science 366 (6461): 120-124.
[3] Diaz et al 2019.
[4] U.S. Fish and Wildlife Service, 21 Species Delisted from the Endangered Species Act due to Extinction, Oct. 16, 2023, https://www.fws.gov/press-release/2023-10/21-species-delisted-endangered-species-act-due-extinction#:~:text=%E2%80%94%20The%20U.S.%20Fish%20and%20Wildlife,species%20protected%20under%20the%20ESA.
[5] https://www.nps.gov/sagu/learn/nature/gila-monster.htm
[6] https://www.nytimes.com/2023/08/17/health/weight-loss-drugs-obesity-ozempic-wegovy.html
[7] J. Rice, C.S. Seixas, M.E. Zaccagnini et al. 2018. *Summary for Policymakers of the Regional Assessment Report on Biodiversity and Ecosystem Services for the Americas of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*. Available at: https:// https://www.ipbes.net/assessment-reports/americas.
[8] https://www.usda.gov/media/blog/2012/08/07/agricultures-role-ecosystem-services

## The Endangered Species Act

Our national commitment to saving wildlife must start with a strong and fully funded ESA. Enacted more than 50 years ago, the ESA established a visionary strategic commitment to preserve and maintain our nation's biological heritage. The ESA is our flagship law for protecting wildlife and plants from extinction and the cornerstone of our commitment to preserving life on Earth. This landmark law has been remarkably effective at protecting our nation's biodiversity: almost every listed species is still with us today and hundreds are on the path of recovery.

The most important thing Congress can do to improve the ESA's effectiveness is to fully fund it. Although Defenders of Wildlife and others work constantly to improve implementation of the Act, the statutory framework established by the ESA – identifying imperiled species, protecting them and their critical habitat from further harm, and mandating recovery plans to restore them from the edge of extinction – is as sound today as it was in 1973. For this visionary framework to work as Congress originally intended, however, the agencies charged with overseeing and implementing it must have the political will and necessary resources to achieve its visionary purposes and goals.

## The Endangered Species Act Amendments of 2024

The bill before the Subcommittee today would significantly undermine the ability, or render it impossible in some instances, for the ESA to conserve imperiled species. At a time when we should be redoubling our commitment to protect biodiversity and stop extinction, the bill would undermine key provisions of the ESA and result in significant harm to at-risk species and their habitats, further exacerbating the environmental challenges we are facing today.

There are numerous provisions in the bill that would weaken the ESA and lead to significantly decreased protections for imperiled species, ultimately condemning them to continued slow decline. It would drastically rewrite key portions of the ESA to prioritize politics over science and inappropriately shift responsibility from the federal government to the states, many of which do not have sufficient resources or legal mechanisms in place to take the lead in conserving listed species. It would place significant new administrative burdens on already over-burdened agencies. It would turn the current process for listing and recovering threatened and endangered species into a far lengthier process that precludes judicial review of key decisions.

For the remainder of my testimony, I will discuss some of the more significant provisions in more detail.

## Under This Bill, Species Listings Could Move at a Crawl, While Delistings Would Be Fast-Tracked [Sections 101, 302, and 303]

At the heart of the ESA are the listing provisions of section 4, which requires the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the "Services") to determine whether a species is threatened or endangered. Section 4 listing determinations bring those species under the protections of the Act.

The ESA recognizes that timely listing of species is important to achieving the goals of the Act. For that reason, the Act imposes a 12-month deadline for listing decisions. *See* 16 U.S.C. § 1533(b)(3)(B) (listing findings required within 12 months of receipt of petition). In fact, one court noted that Congress has "expressed particular concern for species that had languished for years in status reviews" and "passed the 1982 amendments" to the ESA "for the very purpose of curtailing the process." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1175 (9th Cir. 2002) (cleaned up). The court rejected "an interpretation of the ESA in which listings could admittedly take years." *Id.*

Given the pace of the extinction crisis and the inadequate funding the Services receive to keep up with listing petitions, the Services currently maintain a five-year listing work plan[9] used to prioritize species and predict when certain decisions may be made. The bill would seize on this work plan concept and use it to substantially extend the listing process, eliminating the current mandatory 12-month deadline and providing little recourse in the event that a species rapidly declines and fast action is needed. (The bill does retain the Services' discretion to use its emergency listing authority, but citizens can do little more than request emergency listing, as the ESA does not authorize emergency listing petitions.[10])

Specifically, the bill requires Interior to create and submit annually to Congress a "national listing work plan" with species assigned a priority classification. Depending on a species' priority, the bill gives the Services at least seven years, and for lower-priority species up to 12 years, to make listing decisions—an enormous extension of the current 12-month deadline. Moreover, there is little recourse for the misclassification of species as lower priority, as the bill specifies that classifications are not final agency action which therefore cannot be challenged in court.

Expressly allowing listing decisions to drag on for up to 12 years could ultimately condemn the species to extinction, especially given the precarious state many candidates for listing are in today. Imagine if, in the early years of federal species listing, species such as California condors, Florida panthers, or whooping cranes had been denied listing for up to a dozen years when their numbers had dwindled to almost nothing. They might not be with us anymore. In the years since the Act's passage, it has again been necessary to move quickly to list species that show dramatic decline, both in emergency and non-emergency listings. For example, in 1990 the Fish and Wildlife Service listed the golden-cheeked warbler, which had dwindled to a few thousand, in under a year (*see* 55 Fed. Reg. 18,844 (emergency listing)). Happily, the warbler's numbers have increased since its listing, and there are at least several times that number as of the species' last five year review.[11] And in 1985, the Service listed the West Virginia northern flying squirrel as endangered only eight months after its proposed listing due to habitat loss and other threats (*see* 50 Fed. Reg. 26999 (non-emergency listing)). Recovery actions led to the Service deeming the species recovered and removing it from the endangered species list in 2013 (*see* 78 Fed. Reg. 14,022). As these successes illustrate, we should be shoring up the Services' capacity to move forward with rapid listings when the need arises—not encouraging listings to move more slowly.

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[9] https://www.fws.gov/project/national-listing-workplan

[10] *See* https://www.fws.gov/sites/default/files/documents/ESA-Public-Petition-Guidance.pdf.

[11] U.S. Fish and Wildlife Service. "Golden-cheeked warbler 5-Year Review: Summary and Evaluation" (2014). https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/2219.pdf

Worse still, while forcing species to wait in a long line to receive ESA protections, at the same time this bill would create a speedy exit ramp for species to lose protections via delisting. There is not currently a deadline for initiating species delisting after a status review indicates that the species' listing status should change. This bill would change that. Under the bill, after a decision to delist or "downlist" (*i.e.*, change a species from endangered to threatened), the Services would have to initiate rulemaking to carry out the decision within 30 days. Forcing the Services to move forward so quickly with rulemaking to delist threatens to strain agency resources.

The bill does not stop there, however. It also states that delisting cannot be reviewed by a court during a five-year monitoring period after delisting. This would delay justice for wrongly delisted species—indeed, a five-year pause on litigation is long enough that the species could decline towards extinction during the five-year timeframe.

**The Bill Would Significantly Increase Allowable Take of Threatened Species, Create a Complex and Difficult-to-Administer New Regime for Managing Threatened Species, and Diminish the Longstanding Federal Role in Listed Species Management [Sections 301 and 304]**

Multiple provisions of the bill work together to significantly increase allowable "take" of threatened species (i.e., harm, harassment, killing, etc.) and create a new regulatory scheme that would load new burdens onto already overstretched state and federal wildlife agencies.

Under the guise of "protective regulations," the bill would provide far less protection. To understand how the bill does this, it is important to know as a threshold matter that species listed as threatened under the ESA do not automatically receive the same protections that are afforded to endangered species. Instead, those protections must be extended by regulation. Section 4(d) of the Act provides the Services with the authority to enact such regulations, including, importantly, regulations that provide threatened species with the protections against take that endangered species receive at the time of listing. 16 U.S.C. § 1533(d); *compare id.* § 1538(a) (take protection for endangered species).

For decades, the Fish and Wildlife Service has relied on a so-called "blanket 4(d) rule" to automatically extend these protections to the threatened species that it manages—*i.e.*, land and freshwater species. (The Service also retained the option to provide tailored protections for specific species in specific instances.) A misguided 2019 regulation withdrew the blanket rule, but in April 2024 the rule was reinstated, and today it continues to protect threatened terrestrial and freshwater species against take. *See* 84 Fed. Reg. 44,753 (Aug. 27, 2019); 89 Fed. Reg. 23,919 (Apr. 5, 2024).

Section 304 of the bill would reinstate the 2019 removal of the blanket 4(d) rule, giving the removal the force and effect of law. Importantly, this provision would prevent the Fish and Wildlife Service from enacting *any* blanket rule in the future unless the law were changed.

This prohibition would create a void: without the blanket rule, threatened species have no take protections unless those protections are specifically granted on a species-by-species basis. The need

to act on a per-species basis plainly would require additional resources that would divert scarce Fish and Wildlife Service resources from other important conservation priorities.

Worse still, section 301 of the bill would block the Services from ever completely filling the void left in the wake of the blanket rule, preventing species already at risk of extinction in the foreseeable future from receiving the very protections they need to avoid that fate. This section dramatically limits how much take protection can be afforded to any threatened species (whether terrestrial, freshwater, or marine). Specifically, under the bill, if the Services issue a 4(d) rule that prohibits take, they must provide for a decrease in the stringency of the take prohibitions over time as recovery goals are met and must provide for state management over the species once recovery goals are met—even while a species is still listed.

These provisions are a dramatic change from the status quo and may be catastrophic to our nation's threatened wildlife. First, the bill would shift from a simple and efficient regime, under which Fish and Wildlife Service simply affords take protection to all threatened species in a blanket rule (with customized protections created only on an as-needed basis), to a complex and inefficient one, under which protections are analyzed and implemented species-by-species under a complicated, multi-step scheme. This would almost certainly delay or block needed protections for some species and divert much-needed resources away from the statute's fundamental purpose—to move threatened and endangered species along a path to recovery and a place where they no longer need the ESA's protections.

Second, the bill would shift management of threatened species towards state agencies and away from the federal agencies that have handled these matters for decades. Turning over management of threatened species from federal to state authorities *while the species are still on the federal ESA list* makes little sense. Even setting aside concerns that many state agencies lack the funds to manage federally listed species, often species are known to occur in multiple states. Extending state management over federally listed species would invite interstate conflict and could subject listed species to inconsistent and inadequate protection.

Finally, allowing more take of threatened species invites these species' decline. The point of listing species when they are threatened—*i.e.*, when they may foreseeably become endangered and at risk of extinction, but are not there yet—is to prevent their numbers from dwindling before the situation becomes more critical. Increasing take of threatened species has the opposite effect. Moreover, placing threatened species' recovery further out of reach is expensive, as naturally it costs more to recover a species the further it has slid.[12] For example, California condors' numbers dipped so low that individual animals have needed emergency treatment at zoos—causing disruption and expense that is best avoided by addressing threats at a much earlier stage.

[12] *See* Shortchanged: Funding Needed to Save America's Most Endangered Species, Center for Biological Diversity, at p. 6, https://www.biologicaldiversity.org/programs/biodiversity/pdfs/Shortchanged.pdf.

Some of our nation's most iconic species, like manatees and polar bears, are listed as threatened, and that trend is likely to continue. These species should be proactively recovered—not taken in greater numbers leading to accelerated declines rather than recovery.

**The Bill Would Chip Away At Critical Habitat by Creating a Series of Ill-Defined and Hard-to-Apply Carveouts [Section 202]**

In passing the ESA Congress recognized that imperiled species' habitat must be protected if they are to survive and recover. For that reason, the Act requires that with limited exceptions critical habitat be designated for all listed species. *See* 16 U.S.C. § 1533(a)(3). That habitat then receives special protection, including protection from "destruction or adverse modification" under section 7. *Id.* § 1536(a)(2). The prohibition against destruction or adverse modification of critical habitat only applies to activities carried out, funded, or permitted by federal agencies, and does not apply to private landowners unless there is a federal nexus.

The current process of designating critical habitat is grounded in science and is also pragmatic. Designation is conducted based upon the best available science, with economic and security considerations also folded into the process. *Id.* § 1533(b)(2).

The bill would make this sensible process far more complex, creating a series of complicated carveouts from critical habitat that would be difficult to apply. Even if the Services did manage to apply them, the carveouts could serve only to subtract from the habitat protections that imperiled species need to survive.

Specifically, the bill would preclude critical habitat designation on a wide array of lands—*i.e.*, any privately owned or controlled land or other geographical area, so long as there is a land management plan in place that meets a complicated string of criteria. Applying these criteria would require the Services to make judgments about (to name just two examples): whether a state or federal land management plan is "similar in nature to" a management plan for military installations under another federal statute called the Sikes Act; and whether the plan (again, state or federal) is submitted "in a manner that is similar to" the submission of a Habitat Conservation Plan under section 10 of the ESA.

Even identifying what lands qualify for these carveouts would be massively time-consuming and resource intensive, apparently requiring the Services to assess a wide array of *state and federal* land management planning regimes that they may never have encountered before. But assuming the Services could even manage to apply the carveouts, the results would undermine the survival and recovery of listed species. Any land carved out from critical habitat designation under this provision would almost certainly be provided far less protection than critical habitat.

**The Bill Would Codify Harmful 2019 Regulatory Definitions, Narrowing Critical Habitat Still Further, Impeding Species Listings, and Increasing the Risk that Federal Agency Actions Harm Species [Section 2]**

The bill would enshrine in statute several 2019 regulatory definitions, most of which have since been reworked by the Services. These changes would do real harm to species and their habitat.

**Foreseeable Future**

First, the bill would redefine the term "foreseeable future," which is important because threatened species are defined under the ESA as species likely to become endangered within the foreseeable future. *See* 16 U.S.C. § 1532(20). The way that the Services define the term "foreseeable future" therefore influences whether a whole suite of species receives ESA protection.

The bill would codify a now-abandoned 2019 definition of the term under which the foreseeable future extends only as far as the Services can determine that the species' threats are "likely." 84 Fed. Reg. 45,020, 45,052 (Aug. 27, 2019); *cf.* 89 Fed. Reg. 24,300, 24,335 (Apr. 5, 2024). By using the term "likely," the 2019 definition appears to jettison a longstanding practice of using extrapolation and scientifically grounded prediction, based upon available scientific data, to assess foreseeable future threats to species. A 2009 "M-Opinion" from the Interior Department[13] for a decade provided lengthy, detailed, and well-respected guidance on how to approach decisions where data is limited. The 2019 regulations unwisely departed from that guidance by fashioning a new "likelihood" standard; the 2024 regulations partially reinstated the well-respected prior standard, but the bill would undo that improvement.

**Habitat**

In addition, under the bill a new definition of "habitat" applicable for purposes of designating critical habitat would exclude currently unoccupied habitat. This exclusion would prevent the Services from designating critical habitat in areas that might be needed to conserve species in the future even if those areas cannot support the species right now.

The proposed definitional change expands upon, and worsens, a 2019 regulatory change that limited, but did not altogether eliminate, the designation of currently unoccupied habitat. *See* 84 Fed. Reg. at 45,053. That 2019 change was recently reversed, *see* 88 Fed. Reg. 40,764, 40,768 (June 22, 2023); 89 Fed. Reg. at 24,335, but would be reinstated and significantly worsened in the current draft bill.

Excluding currently unoccupied critical habitat ignores the scientific reality that climate change is rapidly shifting the geographic locations of areas that support species.[14] For example, species may

[13] Available at https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37021.pdf.

[14] *See, e.g.*, Melanie A. Harsch, et al., Moving Forward: Insights and Applications of Moving-Habitat Models for Climate Change Ecology, J. Ecology (2016); Jennifer Wilkening et al., Endangered Species Management and Climate Change:

move northward, or further up mountain slopes, as they seek refuge from hot and dry conditions or follow shifting vegetation patterns.[15] It is very important that the Services retain the ability to designate currently unoccupied habitat that may well be vital to species' survival in the future.

**Environmental Baseline**

Finally, the bill would codify the 2019 definition of the term "environmental baseline." The environmental baseline is important in consultations under section 7 of the ESA, in which the Services analyze the effects of agency actions by adding those effects to the environmental baseline. 50 C.F.R. § 402.14(g). Inflating the baseline—by shifting harms from the "effects" to the "baseline" side of the ledger—obscures the harms of agency actions by making the effects look small in comparison with the existing picture. This increases the temptation to dismiss harmful effects as minor. The bill encourages just such faulty reasoning by folding certain ongoing agency activities into the baseline. It is harmful to include ongoing activities in the baseline because ongoing activities are sometimes the very activities that jeopardize species. For example, dams in the Pacific northwest that predate the ESA have placed some native salmon runs in jeopardy in a way the ESA forbids, but if these "ongoing" harms are simply part of the baseline, they are rarely or never addressed in ESA consultation.

**The Candidate Conservation Agreement with Assurances Provisions of the Bill Would Weaken the ESA's Core Protections [Section 201]**

Candidate Conservation Agreements with Assurances (CCAAs) cover "candidate species," or species that have not been listed yet, and are designed to address identified threats and proactively conserve the species. CCAAs may be used, for example, to provide a benefit to species that the Service have concluded warrant listing, although listing is currently precluded by the need to proceed with higher priority actions. Under these CCAAs, if a species ultimately is listed then participants in the agreement are automatically given a permit that covers activities that may result in taking the newly listed species.

Recent problems indicate the CCAA program needs substantial reform in order to meet its goals. For example, in Texas, the failure of the Texas Conservation Plan to protect sufficient dunes sagebrush lizard habitat led the Texas state government to terminate that CCAA and surrender the permit issued under it.[16] In addition, an audit of a multi-state CCAA covering the lesser prairie-chicken found that the CCAA was not meeting its conservation goals, and that the agreement as written did not allow the Fish and Wildlife Service to properly assess the CCAA's performance.[17]

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When Habitat Conservation Becomes a Moving Target, Wildlife Society Bulletin (2019), https://wildlife.onlinelibrary.wiley.com/doi/abs/10.1002/wsb.944.

[15] I-Ching Chen, et al., Rapid Range Shifts of Species Associated with High Levels of Climate Warming, Science (2011), https://www.science.org/doi/10.1126/science.1206432.

[16] November 8, 2018 Letter from the Texas Comptroller of Accounts to the U.S. Fish and Wildlife Service, https://www.biologicaldiversity.org/species/reptiles/dunes_sagebrush_lizard/pdfs/DSL-plan-withdraw-letter.pdf

[17] See Western Association of Wildlife Agencies, "2019 Annual Report for the Range-wide Oil and Gas Candidate

This bill would make the CCAA program—which, as noted, already needs improvement—weaker. For example, the bill would *require* agencies to approve a CCAA proposal if it meets certain requirements. *See, e.g.*, 50 C.F.R. § 17.32(d). This shift risks converting agency scrutiny of CCAA applications into something more akin to a box-checking exercise. Worse still, the bill would make CCAAs available on federal lands (to federal land lessees or permittees) and then deem them exempt from ESA section 7 inter-agency consultations and ESA substantive standards—no matter their size or scope. These provisions could pave the way for extractive resource uses on federal lands without any review under section 7: the vital consultation program that ensures that federal activities are not likely to jeopardize the continued existence of a listed species or adversely modify or destroy its critical habitat.

In addition, the bill inappropriately gives the CCAA program undue weight in the implementation of other parts of the ESA by requiring the Services to factor in the existence of CCAAs when considering whether to list that species as threatened or endangered.

**The Bill Would Obliterate Science-Based Decisionmaking [Section 402]**

A bedrock principle of the ESA is to require that decisions be made using the best scientific and commercial data available. This "best available science" must be used in listing decisions, consultations under the Endangered Species Act, and more. *E.g.*, 16 U.S.C. §§ 1533(b), 1536(a)(2). The standard plays a critical role in ensuring that important decisions about the future of our nation's wildlife are based on information that is high-quality and reliable. The standard also builds inherent flexibility into the ESA, allowing management to adapt as science uncovers more about the fascinating array of native animals and plants that surround us.

The proposed bill would take a sledgehammer to scientific decisionmaking. It would require that a huge and undefined new class of information—*anything* submitted by a state, tribal, or county government—be *deemed* "best available science" without any assessment of its quality. It would allow these entities to pick and choose which information to submit, creating a risk of missing important updates to the science or even a temptation to elevate the information that supports a desired result. Assuming that any information submitted is even scientific and commercial data at all—let alone the *best* data—goes against the very purpose of the scientific process, in which rigorous review by skeptical peers generates information of the highest quality.

**The Bill Would Erode Public Accountability in Wildlife Management [Sections 303, 101, 403, and 404]**

In a nation built on checks and balances, we count on judicial review to ensure that important agency decisions are well-grounded and in line with Congressional intent. This bill touts "greater

Conservation Agreement with Assurances for the Lesser Prairie Chicken," https://www.wafwa.org/Documents%20and%20Settings/37/Site%20Documents/Initiatives/Lesser%20Prairie%20Chicken/Annual%20Reports/2019%20LPC%20CCAA%20Annual%20Report.pdf.

transparency and accountability," but instead promotes the opposite by chipping away at the judicial review function in multiple ways.

First, as mentioned above, the bill constricts judicial review of delisting decisions by foreclosing review for five years after delisting. Second, also mentioned above, the bill makes priority classifications that would significantly influence the timing of listing unreviewable by courts. Finally, the bill includes provisions aimed at deterring citizens from bringing ESA lawsuits by cutting attorney's fees available in some ESA cases. The overall effect is to decrease, not increase, agency accountability.

**The Bill Would Foreclose Full Mitigation For Some Agency Actions that Harm Listed Species [Section 501]**

The bill not only fails to mandate full mitigation for agency actions that harm listed species, in some circumstances the bill *precludes* full mitigation. By way of background, when the Services conduct ESA section 7 consultations to ensure that federal agencies do not take actions likely to jeopardize species or destroy their critical habitat, the Services sometimes issue "incidental take statements" to insulate the action agency against take that may occur as part of the action. These statements include "reasonable and prudent measures" to minimize take. 16 U.S.C. § 1536(b)(4). Under current regulations, reasonable and prudent measures "may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take." 50 CFR § 402.14(i)(2). Reasonable and prudent measures are also already subject to various conditions to protect permittees, including that the Services "cannot alter the basic design, location, scope, duration, or timing of the [permittees'] action" and the measures "may involve only minor changes [to the proposed action]." 50 CFR 402.14(i)(2).

Under the bill, reasonable and prudent measures *would not be allowed to* require the beneficiary of the statement to "fully mitigate or offset" the impact. It is baffling that the bill would *remove* the discretion of the agency to require full mitigation that may be needed to avoid undue harms. Under this bill, even if full mitigation would have the same cost to the permittee as partial mitigation, the agency would be forced to impose only partial mitigation—plainly an inefficient result.

Precluding full mitigation for federal agency action will increase the rate of decline of species and habitat that mitigation is intended to arrest. Human-caused habitat destruction is currently the most significant driver of the biodiversity and extinction crisis.[18] The United States Geological Survey has calculated that from 2001-2016 a remarkable 7.6% of U.S. land cover in the lower 48 states changed at least once.[19] Habitat modification is a threat to a significant majority of listed species and has become more of a driving threat to imperiled species over the life of the Endangered Species Act.[20] Often these harms accumulate gradually, risking "death by a thousand cuts." The Services have tried to stem this trend by providing for offsets in reasonable and prudent measures. 88 Fed. Reg. at

[18] IPBES, Global Assessment Report on Biodiversity and Ecosystem Services, https://www.ipbes.net/global-assessment.
[19] USGS, New Land Cover Maps Depict 15 Years of Change across America, https://www.usgs.gov/news/national-news-release/new-land-cover-maps-depict-15-years-change-across-america.
[20] Matthias Leu et al, *Temporal analysis of threats causing species endangerment in the United States*, Conservation Science and Practice, 2019.

40,761 (requiring offsets where appropriate is needed to reduce as much as possible "the accumulation of adverse impacts, sometimes referred to as 'death by a thousand cuts'"). This bill would roll that policy back.

The removal of discretion may thwart other existing agency policy as well. For example, FWS has set forth a "no net loss" goal in its mitigation policy,[21] and NOAA's Mitigation Policy for Trust Resources has set out a goal of "compensatory mitigation that is proportional to impacts to NOAA trust resources and offsets those impacts to the full extent provided by NOAA authorities."[22] It is hard to see how these no net loss objectives could be tenable if full mitigation is not allowed.

**Conclusion**

Preserving our wildlife and the places they call home is a responsibility that transcends human lifetimes. Our future depends on the actions we take now to heal the fabric of life and ensure it can be sustained for years to come.

At this critical moment for the biological health of our planet, the nation must reinvigorate its commitment to conserving imperiled species and their habitat. We must support and strengthen the existing legal and policy framework to better protect wildlife, with the ESA as its cornerstone. Any changes to this bedrock law must be judged by whether they stave off species extinctions, improve species conservation, and support long term recovery. Congressional interference in science-based decisions about how to conserve species is both reckless and inappropriate and would ultimately only serve to undermine the nation's ability to protect biodiversity. As a nation and as responsible stewards of our irreplaceable imperiled wildlife and special places, we can and we must do better. Those that follow us are expecting us to pass on a healthy, vibrant environment replete with wildlife for all to enjoy.

Regrettably, the legislation being considered today would dramatically weaken the ESA and make it harder, if not impossible, to achieve the progress we must make to address the alarming rate of extinction our planet is facing. Failure to conserve our planet is not an option and this legislation being considered today clearly sends us in that direction.

Thank you for considering my testimony.

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[21] *See* 88 Fed. Reg. 31,000 (May 15, 2023).

[22] NAO 216-123: NOAA Mitigation Policy for Trust Resources, https://www.noaa.gov/organization/administration/noaa-administrative-orders-chapter-216-program-management/nao-216-123-noaa-mitigation-policy-for-trust-resources#:~:text=Compensatory%20Mitigation%20%E2%80%93%20a%20method%20of,with%20commensurate%20functions%20and%20services.