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BEFORE THE HOUSE NATURAL RESOURCES SUBCOMMITTEE
ON WATER, WILDLIFE, AND FISHERIES
UNITED STATES HOUSE OF REPRESENTATIVES

LEGISLATIVE HEARING ON H.R. 520 (Rep. McClintock), H.R. 2990 (Rep. Bonamici), H.R. 5103 (Rep. Donalds), H.R. 5504 (Rep. Newhouse), H.R. 5509 (Rep. Porter), H.R. 5874 (Rep. Ciscomani), and H.R. 6008 (Rep. Graves of Louisiana)

OCTOBER 25, 2023

Good afternoon, Chairman Bentz, Ranking Member Huffman, and Members of the Subcommittee. Thank you for inviting me to this legislative hearing today as you consider several bills relating to the Endangered Species Act.

My name is Stephen Roady. I teach at Duke University, both in the Law School and at the School of the Environment. My courses include classes on ocean and coastal law and policy, and on environmental law and litigation. Prior to joining the Duke faculty, I practiced environmental law for 40 years here in Washington, and also engaged in ocean policy work. My law and policy practice included a number of cases that involved species protected by the Endangered Species Act, such as whales and sea turtles. I am appearing today in my individual capacity, and am not speaking on behalf of Duke University.

Introduction

As requested in your invitation, I will focus on three of the bills under consideration today by the Subcommittee: H.R. 520, H.R. 5504, and H.R. 6008.

My testimony today emphasizes the vital importance of the Endangered Species Act, particularly at this time when we are facing a biodiversity crisis, and highlights ways in which these bills are inconsistent with the central purposes of that Act.

I will begin with a review of the origins and purposes of the Endangered Species Act (ESA or Act). Next, I will highlight the importance of current efforts by the federal government to revise regulations that implement the Act. Finally, after touching on the reasons for ensuring that wild populations should be protected in their natural habitat, I will address the problems and risks associated with H.R. 6008, especially as they relate to the possibility of extinction for a species of large whale in the Gulf of Mexico known as Rice's whale.

1. Importance and Success of the Endangered Species Act

Congress passed the Endangered Species Act with overwhelming bipartisan support in 1973 in response to a growing awareness of extinction threats facing many species. The Act was the product of a collaboration between a Democrat, John Dingell of Michigan, and a Republican, Pete McCloskey of California, and it originated in the precursor to this very subcommittee.

The Act is designed to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species....”¹ The Act has two central purposes: (1) to prevent species from extinction, and (2) to recover their populations to healthy levels in their natural habitats.

The Act seeks to protect and recover imperiled species in a straightforward manner. First, it provides for a process that lists species in need of protection. Second, it prohibits both individuals and federal agencies from taking actions that harm listed species.

Under the Act, species can be listed as threatened or endangered based on five statutory factors. These factors include destruction of species habitat or range, as well as manmade factors affecting the continued existence of the species. The Act explicitly states that listing decisions are to be made “solely on the basis of the best scientific and commercial data available.”² Thus, economic factors are not allowed to be considered when deciding whether to list a species as protected under the Act.

The ESA defines an endangered species as “any species which is in danger of extinction throughout all or a significant portion of its range.”³ A threatened species is defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁴ At the time that a species is listed as threatened or endangered, the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (the two agencies charged with administering the Act) must consider the designation and protection of critical habitat for the species, defined as areas that are essential for the survival and recovery of the species.⁵

The principal operating architecture of the Act is contained in Sections 4, 7, and 9. Section 4 sets out the process by which a species can become listed, and its habitat protected as “critical.” As part of that process, subsection 4(d) requires the government to establish regulations to conserve threatened species, including by prohibiting “take” of that species.⁶ Section 7 prohibits federal agencies from jeopardizing the existence of listed species, and also from adversely modifying critical habitat of those species.⁷ Section 9 prohibits any person from “taking” any

¹ 16 U.S.C. § 1531(b).

² 16 U.S.C. § 1533(b)(1)(A).

³ 16 U.S.C. § 1532(6).

⁴ 16 U.S.C. § 1532(20).

⁵ 16 U.S.C. § 1532(5)(a).

⁶ 16 U.S.C. § 1533, 1533(d).

⁷ 16 U.S.C. § 1536(a)(2).

endangered species.⁸ The Act defines the term “take” broadly, as follows: “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁹

The Supreme Court emphasized 45 years ago that the clear intention of Congress in enacting the ESA “was to halt and reverse the trend toward species extinction, whatever the cost.”¹⁰ In the famous case of *Tennessee Valley Authority v. Hill*, the Court noted that this central purpose “is reflected not only in the stated policies of the ESA, but in literally every section of the statute.”¹¹

The Endangered Species Act has proved to be a bulwark against the erosion of biodiversity in this country. Since its passage, the Act has prevented the extinction of 99 percent of the species under its care, including the gray whale, the California condor, the Florida manatee, and our nation’s symbol, the bald eagle. Not only is the ESA highly effective, but it is also wildly popular, with 90 percent of Americans supporting the Act.¹²

The importance of the ESA has never been more evident. Scientists agree that we are in the midst of an unprecedented biodiversity crisis: worldwide, we are losing species at a rate unparalleled in human history.¹³ A recent comprehensive report from the United Nations Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services concludes that nature is in a dangerous decline, with species extinction rates accelerating.¹⁴ This crisis threatens the ecosystems upon which we all depend, and has the potential to threaten not only our environment, but also public health.¹⁵

Under these circumstances, it is surpassingly important that we ensure this country continues to carry through with the central intention of the Act: to halt and reverse the trend toward species extinction. Unfortunately, the three bills before the Subcommittee today do just the opposite.

⁸ 16 U.S.C. § 1538(a)(1).

⁹ 16 U.S.C. § 1532(19).

¹⁰ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

¹¹ *Id.* at 180.

¹² Tulchin Research, “Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters Nationwide,” July 6, 2015: <http://www.defenders.org/publications/Defenders-of-Wildlife-National-ESA-Survey.pdf>.

¹³ Gerardo Caballos, Paul R. Ehrlich, Rodolfo Dirzo, “Biological annihilation via the ongoing sixth mass extinction signaled by vertebrate population losses and declines,” PNAS, July 10, 2017: <https://www.pnas.org/doi/full/10.1073/pnas.1704949114>.

¹⁴ UN Report: Nature’s Dangerous Decline ‘Unprecedented’; Species Extinction Rates ‘Accelerating’: <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>

¹⁵ Dirk Schmeller, Frank Courchamp, and Gerry Killeen, “Biodiversity loss, emerging pathogens, and human health risk,” 29 *Biodiversity and Conservation* 3095-3102 (2020): <https://link.springer.com/article/10.1007/s10531-020-02021-6>.

2. Observations on H.R. 5504

In the midst of the current biodiversity crisis, we should be working to strengthen, not weaken, the Endangered Species Act, which is our nation’s best hope for helping to prevent extinction. This is what the current Administration is doing; it has proposed rules that would help ensure that the purposes of the Act are implemented in a manner faithful to the purposes and language of the Act. By contrast, H.R. 5504 would suspend that rulemaking effort, and would instead leave in place regulations that weaken the Act.

The previous Administration took a major step in the wrong direction by adopting several regulatory revision packages that violate the ESA, weaken its implementation, and undermine its purpose of conserving imperiled species and the ecosystems upon which they depend.¹⁶ Briefly stated, these revisions: (1) allowed the consideration of economic factors as part of the decision to list species as threatened or endangered, (2) eliminated automatic protections from harm for any species listed as threatened, (3) allowed consulting agencies to rely on an action agency’s claim that it will mitigate any incidental harm to affected species without requiring any demonstration of specific binding mitigation plans, and (4) allowed agencies to consider whether modifications or destruction of critical habitat are significant when compared to the value of that habitat “as a whole.” Each of these revisions undermines the purposes and efficacy of the Act.

The rules proposed by the current Administration would correct those illegal regulatory revisions. They are designed to return to the original intention of the Act. Among other things, the proposed rules would reinstate prior language affirming that listing determinations are made without reference to possible economic impacts.¹⁷ In addition, the proposed rules would reinstate the government’s practice of automatically extending the protections of Section 9 (prohibiting “take”) to species listed as threatened.¹⁸

Numerous parties have filed comments on these proposed rules, and the government is now reviewing those comments. Given the fundamental importance of protecting against the biodiversity crisis, the process should be allowed to proceed so that the government can decide on its final proposals in light of all relevant information generated in the comment process. But H.R. 5504 would shut down this process. Therefore, H.R. 5504 should not be approved.

3. Observations on H.R. 520

Like H.R. 5504, the provisions of H.R. 520 would weaken the Endangered Species Act. This bill would allow the government to rely upon artificially-propagated species to substitute for the loss of wild species. In addition, it would require the government to make no distinction between artificially-propagated species and natural species in making determinations under the Act. If

¹⁶ Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753 (August 27, 2019) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44976 (August 27, 2019) (to be codified at 50 C.F.R. pt. 402); Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020 (August 27, 2019) (to be codified at 50 C.F.R. pt. 424).

¹⁷ 88 Fed. Reg. 40764 (June 22, 2023).

¹⁸ 88 Fed. Reg. 49742 (June 22, 2023).

enacted, this bill would erode – rather than enhance – protections for threatened and endangered species.

In particular, H.R. 520 would risk taking the focus away from a fundamental purpose of the ESA: ensuring that species thrive over the long term by protecting the ecosystems on which they depend, and to which they contribute. Salmon on the West coast are the perfect example of why it simply does not work to protect species as somehow separate from their habitats. Salmon born in mountain streams and creeks are a source of food for countless other species as they migrate to the ocean, where they are both predator and prey for carefully balanced marine ecosystems. The adult salmon that return to these streams to spawn the next generation, and then die, bring vital marine-derived nitrogen deep into inland landscapes, such that forests as far inland as central Idaho have evolved to depend on the annual boost of nitrogen from spawning salmon.

In short, H.R. 520 would destroy one of the central pillars of the Endangered Species Act. For this reason alone, H.R. 520 should not be approved.

4. Observations on H.R. 6008

H.R. 6008 is a particularly problematic example of an effort to undermine the Endangered Species Act. If approved, it would delay protections for the critically endangered Rice’s whale, increasing the already-considerable risk that the whale would become extinct. Nothing could be more antithetical to the purposes and the plain language of the Act.

H.R. 6008 is being proposed after a long effort by a number of parties to protect the endangered Rice’s whale from the effects of oil and gas activities in the Gulf of Mexico. The best available scientific evidence demonstrates that Rice’s whale lives only in the Gulf, that only about 50 individual whales remain alive, and that the species is facing the possibility of extinction as a result of oil pollution, ship strikes, and noise.¹⁹ Under these circumstances, immediate actions are needed to preserve both these whales and their habitat. Regrettably, H.R. 6008 would prevent such action, and would instead postpone efforts to protect this whale from harm. Delay of the kind promoted by H.R. 6008 poses great risk to the very survival of Rice’s whale.

The best science starkly demonstrates how closely Rice’s whale is hovering near extinction. The condition of the whale is so acute that the National Marine Fisheries Service has concluded that “the loss of even a single reproductive female could lead this species to extinction.”²⁰ The seriousness of the imminent peril facing this whale was underscored further in an October 2022 letter, signed by more than 100 marine science experts from across the country, which notified

¹⁹ 84 Fed. Reg. 15,466 (Apr. 15, 2019) (listing primarily because of “its small population size and restricted range” and harm from “energy exploration, development and production, oil spills and oil spill response, [and] vessel collision.”)

²⁰ Comments of Andrew J. Strelcheck, NMFS Regional Administrator for the Southeast Regional Office, to Tershara Matthews, Chief of Emerging Programs, BOEM, on Draft Environmental Assessment for commercial leasing wind power development on the Outer Continental Shelf in the Gulf of Mexico 6 (Feb. 9, 2022).

the federal government that the whale urgently needed protection from oil and gas activities in the Gulf in order to avoid extinction.²¹

Rice's whale is the only great whale species resident year-round in U.S. waters. It is acutely vulnerable to vessel strikes, as it spends the majority of its time near the ocean surface – about 90% of the time at night, when the whales come to the surface to rest, and 70% of the time overall.²² Their behavior therefore places them at significant risk of being struck by large commercial vessels. In a 2020 Biological Opinion, the National Oceanic and Atmospheric Administration (NOAA) found that mortalities from vessel strikes are likely to exceed—by more than ten times—what the species can sustain.^{23 24}

Oil and gas industry operations in the Gulf of Mexico have already very significantly degraded the population of Rice's whale, and they are a major contributor to vessel strike risk for the whale. In 2020, NOAA found that the oil and gas industry represents about one-third of the total risk from vessels transiting through the whale's habitat.²⁵ A very recent update by a former Duke University researcher using the latest data on Rice's whale distribution shows that industry vessels are responsible for an even larger share of that risk of ship strikes: about 40% of the total.²⁶ Furthermore, the National Marine Fisheries Service estimates that the BP Deepwater Horizon oil spill eliminated 22% of the species' population.²⁷

In the wake of the Deepwater Horizon disaster, the National Marine Fisheries Service (NMFS) intensified its study of Rice's whale, and has recently released several peer-reviewed studies demonstrating that the whale's habitat stretches across the continental shelf break in the Northern Gulf of Mexico from the Mexico border to Florida. Based on confirmed observations, acoustic recording of the whales' calls, and habitat modeling, these studies demonstrate that the whale

²¹ P. Corkeron et al., An Open Letter to the Biden Administration, Oct. 12, 2022 (statement of approximately 100 marine Scientists), available at <https://www.neaq.org/wp-content/uploads/2023/06/Scientist-statement.-GoM-whale.-Oct.-2022.pdf>

²² Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico (Mar. 2020) at 347

²³ *Id.* at 363 (concluding that even with proposed mitigation, there would still be “16 vessel strikes of Bryde's whales over 50 years, with 12 of these strikes expected to result in serious injury or mortality”).

²⁴ Hayes SA, Josephson E, Maze-Foley K, Rosel PE, Turek J, editors. 2021. US Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2020. Woods Hole (MA): National Marine Fisheries Service. Report No.: NOAA Technical Memorandum NMFS-NE-271. 403 p. doi:10.25923/nbyxp656 (estimating a “potential biological removal” of 0.1, which means that only one Rice's whale can die from non-natural causes per decade in order for the species to reach a sustainable population)

²⁵ 2020 Biological Opinion, *supra*, n. 22 at 358.

²⁶ Spatial analysis of ship-strike risk for Rice's whale in the Gulf of Mexico, Benjamin D. Best, Ph.D., available at <https://ecoquants.com/ricei/#ref-nmfsBiologicalOpinionFederally2020>

²⁷ 2020 Biological Opinion, *supra* n. 22 at 268.

“persistently” occurs in waters 300-1200 feet (100-400 meters) deep throughout this northern Gulf shelf break.^{28 29 30 31}

The “stipulated agreement” referenced in H.R. 6008 is a federal court-approved document that emerged from a court-supervised mediation process. This agreement puts a hold on a lawsuit filed in 2020 against a Trump Administration biological opinion governing Gulf of Mexico oil and gas activities. That biological opinion failed to evaluate accurately the potential for future oil spills in the Gulf and did not require sufficient safeguards to protect imperiled Rice’s whales, sea turtles, and other endangered and threatened marine species from industrial offshore drilling operations.

After more than two years of litigation, and based on new information about oil spill risk and the new science about Rice’s whale habitat throughout the Gulf, the government announced that it would reconsider that 2020 decision. In order to gain a more accurate and up-to-date understanding of the threats to the whales -- and the protections to mitigate them -- throughout its northern Gulf habitat, the government is already engaged in this new biological review of the best available science.

The “stipulated agreement” to temporarily pause the case while this expanded assessment takes place is based on three short-term actions that are designed to better safeguard Rice’s whales during the one-year period that the case is on hold:

1. The Bureau of Ocean Energy Management (BOEM) will exclude Rice’s whale habitat from any lease sales that occur while the lawsuit stay is in effect.
2. BOEM will require future oil and gas leaseholders to reduce the risks of vessel strikes to Rice’s whales throughout their northern Gulf habitat. Any lease sales held during the stay of the lawsuit will include a requirement reducing oil-and-gas-related vessel speed to 10 knots when traveling through the whale’s defined habitat until a new biological opinion is completed.
3. BOEM notified existing oil and gas leaseholders of the threat that vessels pose to Rice’s whales and reminded operators of their responsibilities to avoid “take” (harming, killing, or harassing) of protected species when seeking permits. It also outlined recommended vessel speed reductions and measures operators should take in the whales’ habitat.

²⁸ Soldevilla, et al., *Spatial distribution and dive behavior of Gulf of Mexico Bryde’s whales: potential risk of vessel strikes and fisheries interactions*, 32 *Endangered Species Rsch.* 533 (June 2017), available from <https://repository.library.noaa.gov/view/noaa/16050>.

²⁹ NOAA RESTORE Science Program, “Trophic Interactions and Habitat Requirements of Gulf of Mexico Rice’s Whales,” available at restoreactscienceprogram.noaa.gov/projects/rices-whales NOAA Fisheries, “Trophic Interactions and Habitat Requirements of Gulf of Mexico Rice’s Whales,” available at <https://www.fisheries.noaa.gov/southeast/endangered-species-conservation/trophic-interactions-and-habitat-requirements-gulf-mexico>

³⁰ J.J. Kiszka, M. Caputo, J. Vollenweider, M.R. Heithaus, L.A. Dias, and L.P. Garrison, Critically endangered Rice’s whale (*Balaenoptera ricei*) selectively feed on high-quality prey in the Gulf of Mexico, *Scientific Reports* 13: art. 6710 (2023).

³¹ N.A. Farmer, J.R. Powell, J.A. Morris, Jr., M.S. Soldevilla, L.C. Wickliffe, J.A. Jossart, J.K. MacKay, A.L. Randall, G.E. Bath, P. Ruvelas, L. Gray, J. Lee, W. Piniak, L. Garrison, R. Hardy, K.M. Hart, C. Sasso, L. Stokes, and K.L. Riley, Modeling protected species distributions and habitats to inform siting and management of pioneering ocean industries: A case study for Gulf of Mexico aquaculture, *PLoS ONE* 17: art. e0267333 (2022).

Expert scientists believe that these stop-gap measures established in the “stipulated agreement” are insufficient to protect and recover these whales in the long-term. Nevertheless, they will make conditions relatively better for the whales while the government evaluates what protective measures are needed to assure the species’ long-term survival. They are the kind of responsive actions that the Endangered Species Act requires and encourages in light of new science.³²

The first two of these measures are currently being challenged in court by several oil companies and the State of Louisiana. That case is ongoing. H.R. 6008 would not only short-circuit that litigation, but would also prevent the government from implementing the agreement itself, and thereby remove those protections for the whales at a time when they are on the verge of extinction.

In addition to preventing the government from implementing these interim measures that would help protect Rice’s whale until the government’s evaluation is complete in September 2024, H.R. 6008 would impose further layers of delay on efforts to establish other needed protections.

Among other things, if approved, H.R. 6008 would prohibit BOEM from moving forward to implement any other additional protections for Rice’s whales until a new Biological Opinion is completed. But at the same time, it would delay and interfere with the agency’s production of that Biological Opinion. First, it would prohibit NMFS from beginning work on a new Biological Opinion until after a recently-proposed Critical Habitat Designation is finalized. And even after the agency’s review is complete, H.R. 6008 would require NMFS to await publication of a separate and redundant National Academies study of the Rice’s whale range before it issues the new Biological Opinion. Such a study could take several years to complete.

H.R. 6008 would further interfere with the government’s ongoing evaluation by requiring NMFS to hold special meetings with industry about any proposed Reasonable and Prudent Alternatives (RPAs). This unusual procedure would allow industry an unrebutted opportunity to influence decisions on alternative actions.

In summary, H.R. 6008 would strip away vitally necessary protections from a whale that is on the verge of extinction, and in their place would impose a series of delays on efforts to reduce risks posed to the whale by oil and gas activities in the Gulf of Mexico. In so doing, it would increase the risks to that whale at precisely the time it is most in need of the protections that are at the heart of the Endangered Species Act. Accordingly, H.R. 6008 should not be approved.

Conclusion

All of the bills under consideration by the Subcommittee today that are related to the Endangered Species Act – H.R. 520, H.R. 5504, and H.R. 6008 – are inconsistent with the central purposes and plain language of that Act. They should not be approved.

Thank you again for the opportunity to meet with you today. I would be glad to respond to questions.

³² See “Editorial: Rice’s whale is a rare Gulf treasure — one endangered by oil drilling” *Houston Chronicle* (Jan. 24, 2023).