

**WRITTEN STATEMENT FROM
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

**LEGISLATIVE HEARING
ON
H.R. 8811 and H.R. ____**

**BEFORE THE
SUBCOMMITTEE ON WATER, WILDLIFE, AND FISHERIES
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES**

JULY 9, 2024

Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee, thank you for the opportunity to provide comments regarding H.R. 8811, “America’s Conservation Enhancement Reauthorization Act of 2024” and H.R. ____, the “ESA Amendments Act of 2024”.

The National Oceanic and Atmospheric Administration (NOAA) is responsible for the stewardship of the nation’s living marine resources and their habitat. Backed by sound science and an ecosystem-based approach to management, NOAA Fisheries provides vital services for the nation, including sustainable management of our fisheries, ensuring safe sources of seafood, and the recovery and conservation of protected species and healthy ecosystems. The resilience of our marine ecosystems and coastal communities depends on healthy marine species, including protected species such as whales, sea turtles, salmon, and corals.

The Endangered Species Act

Under the Endangered Species Act (ESA), NOAA Fisheries works to recover marine and anadromous species while preserving robust economic and recreational opportunities. There are more than 160 endangered and threatened marine and anadromous species under NOAA’s jurisdiction. Our work includes listing species under the ESA, monitoring species status, designating critical habitat, implementing actions to recover endangered and threatened species, consulting with other federal agencies to insure their activities are not likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat, developing ESA policies, guidance, and regulations, and working with partners to conserve and recover listed species. NOAA Fisheries shares the responsibility of implementing the ESA with the U.S. Fish and Wildlife Service (hereafter referred to as the Services).

Recognizing that the value of our natural heritage is incalculable, Congress enacted the ESA nearly unanimously in 1973, in acknowledgement of the broad public support for the prevention of species extinction and the conservation of ecosystems and biodiversity. The ESA is the nation's foremost conservation law for protecting wildlife and plants in danger of extinction. It plays a critical, science-based role in preventing the extinction of imperiled species, promoting their recovery, and conserving their habitats. It has been extraordinarily effective at preventing species from going extinct and has inspired voluntary action to conserve at-risk species and their habitat before they reach the point where they would qualify to be listed as threatened or endangered. Since it was signed into law, more than 99 percent of the species listed have been saved from extinction.

We offer the following comments on H.R. 8811, "America's Conservation Enhancement Reauthorization Act of 2024" and H.R. ____, the "ESA Amendments Act of 2024".

H.R. 8811 - America's Conservation Enhancement Reauthorization Act of 2024

As a founding member of the National Fish Habitat Partnership (NFHP), NOAA provides national and regional leadership, funding, and technical expertise for coastal and marine activities that support its mission. NOAA is a committed partner in implementing the National Fish Habitat Action Plan to achieve healthy ecosystems, sustainable marine life, and resilient coastal communities through innovative solutions, flexible management, adaptability, and scientific research.

NOAA is supportive of the changes in Title II of HR 8811 related to the National Fish Habitat Partnership. Among those changes we support are the expansion of the National Fish Habitat Board to add a member from Regional Fishery Management Councils or Interstate Marine Fisheries Commissions as habitat conservation is essential to maintaining the sustainability of coastal and marine fisheries. We also support the change in section 203 to ease time constraints of fish habitat conservation projects recommended for funding by the Board to improve efficiency in the process.

H.R. ____ - ESA Amendments Act of 2024

The purposes of the Endangered Species Act of 1973, as amended, are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions.

The ESA Amendments Act of 2024 would amend several provisions of the ESA including provisions pertaining to listing species, designating critical habitat, inter-agency cooperation, and promulgating protective regulations under section 4(d) for threatened species. NOAA Fisheries has concerns with many of these provisions because they would do little to improve conservation

outcomes, would increase the cost and complexity of administering the ESA, and would reduce opportunities for public engagement. NOAA Fisheries supports the goal of optimizing species conservation and recovering listed species and is available to provide specific feedback, but strongly opposes this bill as currently drafted.

Definitions [Section 2]

Section 2 of the ESA Amendments Act of 2024 would codify the Services' 2019 regulation with respect to the interpretation of the "foreseeable future" in listing determinations. The ESA defines a threatened species as a species in danger of extinction throughout all or a significant portion of its range. NOAA Fisheries opposes this provision of the bill.

In 2024, the Services revised 50 CFR § 424.11(d), first promulgated in 2019, which describes the Services' framework for interpreting and implementing the term "foreseeable future." Our intent was to promulgate a regulation that was consistent with the Services' long standing practice based on a 2009 opinion from the Department of the Interior, Office of the Solicitor (M-37021, January 16, 2009; "M-Opinion"), that provides guidance on addressing the concept of the foreseeable future within the context of determining the status of species. However, following promulgation of the 2019 regulations, the language in the final rule created confusion regarding the way in which the Services interpret and implement this term. The 2019 regulation created confusion because it seemed to suggest the Services were adopting a novel requirement to conduct an independent analysis of the status of the species, rather than simply articulating how we determine the appropriate timeframe over which to conduct that analysis. The Services found it necessary and appropriate to revise this regulatory provision to explain more clearly the concept of the foreseeable future as it is used in the Act's definition of a "threatened species" and to align the regulatory language more closely to that of the M-Opinion. The revised description of the "foreseeable future" in the 2024 regulations is a more appropriate and clearer interpretation of these statutory terms.

Section 2 would also amend the ESA to codify the 2020 definition of "habitat" that the Services rescinded in 2022. NOAA Fisheries opposes this provision of the bill.

In 2020, the Services promulgated a regulatory definition of habitat for the purposes of designating critical habitat that defined habitat as "the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species." Following promulgation of this regulatory definition, the Services reconsidered the habitat definition rule and concluded that codifying a single definition in regulation could impede the Services' ability to fulfill their obligations to designate critical habitat based on the best scientific data available. The Services found that it is instead more appropriate, more consistent with the purposes of the Act, and more transparent to the public to determine what areas qualify as habitat for a given species on a case-by-case basis using the best

scientific data available for the particular species. As a result, the Services rescinded the definition in 2022.

Listing Determinations [Sections 101, 201, and 405]

Section 101 of The ESA Amendments Act of 2024 would amend the ESA to require the Services to develop a National Listing Work Plan. While this has been an important tool for the U.S. Fish and Wildlife Service, the development of a National Listing Work Plan is unnecessary for NOAA Fisheries because NOAA Fisheries does not have the same workload versus capacity constraints as the Service and therefore is generally able to manage its ESA petition workload. Developing and maintaining this work plan could divert resources away from assessing petitions and conducting status reviews.

The ESA Amendments Act of 2024 would also amend the ESA to remove candidate species from the list of eligible species to receive funding under Section 6 agreements with States. NOAA Fisheries believes it is important to continue to explicitly include candidate species in the statute as eligible species for funding under Section 6 cooperative agreements with States.

Section 201 of the ESA Amendments Act of 2024 would amend the ESA to require the Services, when determining whether to list a species, to take into account the net conservation benefit of any “Candidate Conservation Agreement with Assurances” or “Programmatic Candidate Conservation Agreement with Assurances” for that species. Candidate Conservation Agreements with Assurances are voluntary agreements that are used to provide incentives for non-Federal landowners to conserve candidate and other unlisted species. The Services currently enter into these agreements when we determine that the conservation measures that will be implemented address key current and anticipated future threats that are under the property owner’s control and will result in a net conservation benefit to, and improve the status of, the covered species.

This bill’s definition of “net conservation benefit” differs from that in the 2016 joint NOAA Fisheries and U.S. Fish and Wildlife Service candidate conservation agreement with assurances policy (81 FR 95164). The policy provides a clear definition of the term “net conservation benefit” that specifically refers to cumulative benefits of the conservation measures and describes how the benefits are measured. Consistent with the policy’s definition, the conservation measures and property-management activities covered by the agreement must be designed to reduce or eliminate those key threats on the property that are under the property owner’s control in order to increase the species’ populations or improve its habitat. The ESA Amendments Act of 2024 defines “net conservation benefit” as the net effect of the agreement by comparing the situation of the candidate species with and without an agreement, rather than the cumulative benefits to the species referenced in the policy. As such, the bill would allow for exemption from future listing based on a lower standard than currently applicable, undermining the ability of the ESA to prevent extinction.

Section 405 of the ESA Amendments Act of 2024 would amend the ESA to require the Services to prepare an analysis of the economic effect, the effect on national security and any other relevant effect of listing a species under the ESA at the time the Services list a species as threatened or endangered. NOAA Fisheries opposes this provision of the bill.

This provision would undermine the requirement to base decisions to list species on the best available scientific and commercial data, would negatively affect our ability to make listing determinations within the statutory deadlines, and could introduce political considerations into listing decisions, resulting in delays in providing threatened and endangered species needed protections of the Act.

Critical Habitat [Section 202]

Section 202 of the ESA Amendments Act of 2024 would prohibit the Services from designating as critical habitat lands that are privately owned or controlled, and that are subject to a land management plan that the Secretary determines is similar to an integrated natural resource management plan under Section 101 of the Sikes Act. Privately controlled land is not defined. Existing section 4(a)(3)(B)(i) of the ESA precludes the Secretary from designating as critical habitat lands or geographical areas owned or controlled by the Department of Defense that are subject to an integrated natural resources management plan prepared under the Sikes Act, if the Secretary determines that the plan provides a benefit to the species

When the Services designate critical habitat, we follow a science-based process to identify those specific areas that are essential for species conservation. Critical habitat designations are an important tool to educate the public and other federal agencies regarding areas essential for recovery of listed species.

While some of this provision in the ESA Amendments Act of 2024 is similar to Section 4(a)(3)(B)(i) of the ESA, it includes additional requirements and findings that would be very difficult to produce within the timeframes the ESA requires for critical habitat to be designated. For example, it provides that one way for a land management plan to be prepared is in cooperation with the Services and each applicable State fish and wildlife agency. The resource-intensive task of preparing and assessing potentially multiple plans in multiple states for wide-ranging species would strain the Services' limited resources, and cause delay. Even if land management plans are prepared independently of a multi-agency cooperative process, assessing plans that are otherwise developed and submitted to the Services would also be time-consuming and resource-intensive. In assessing those plans, the Services would be required by this bill to determine, among other things, whether the plan would result in an increase in the population of the species or would maintain the same population as the population that would likely occur if such land or other geographical area were designated as critical habitat. Such an analysis would be difficult to conduct.

Section 202 would also amend section 4(b)(2) to require the Services to take into consideration the impact on efforts of private landowners to conserve the species when specifying a particular area as critical habitat. When designating critical habitat, NOAA Fisheries considers all relevant impacts of specifying any particular area as critical habitat. The Services 2016 Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act lays out, in detail, our approach to how we consider partnerships and conservation plans in the exclusion process. The 2016 Policy continues to provide useful guidance for evaluating private conservation efforts when designating critical habitat. As such, NOAA Fisheries believes this additional consideration is unnecessary.

Protective Regulations for Threatened Species [Section 301]

Section 9 of the ESA lists seven specific prohibited actions with respect to endangered species, which include prohibitions on import, export, interstate and foreign commerce, and take of endangered species of fish and wildlife. The Section 9 prohibitions for endangered species do not automatically apply to threatened species.

The ESA recognizes the different status of threatened and endangered species and provides greater flexibility in the conservation and management of threatened species under Section 4(d). NOAA Fisheries has utilized section 4(d) to provide a flexible, targeted approach to the management and conservation of threatened species.

Section 301 would amend Section 4(d) of the ESA to require that, when a 4(d) rule for a threatened species prohibits an act in Section 9(a) of the ESA, the Services develop incremental recovery goals for that species and provide for the stringency of the regulation to decrease as those recovery goals are met. In addition, under this bill, States could develop a recovery strategy for threatened or candidate species that the Service would adopt as the 4(d) rule within that State if certain criteria are met. These provisions may be difficult to implement because the recovery goals for a threatened species may not be known or may have not been identified at the time of listing the species, and undertaking the activities required by the bill could result in delays in putting protective regulations in place for threatened species. The development of recovery goals and strategies is best done through the development of a recovery plan under Section 4(f) of the ESA. Recovery plans include comprehensive recovery criteria, goals and strategies developed through a collaborative, inclusive process. The additional requirements and the process of reviewing and approving State recovery strategies required by the bill would be a resource-intensive effort that could divert NOAA Fisheries' resources from implementing conservation actions for the species and delay activities that could prevent a species from declining to the point where the statute requires listing it as endangered. Moreover, the petition process also appears to limit the public's ability to provide substantive input in the informal rulemaking process to adopt a 4(d) rule if a state's petition is approved.

5-year Reviews [Section 302]

Section 302 of this bill would revise the requirements in Section 4(c) of the ESA relating to the conduct of 5-year reviews of the status of listed species to determine whether any species should be removed from the list, changed in status from endangered to threatened or from threatened to endangered. Section 302 would require the Services to initiate rulemaking within 30 days of completing a 5-year review of the status of a species to remove or change the status of the species if the 5-year review determined a change in status is warranted. While NOAA Fisheries' goal is to ensure species maintain the proper classification under the ESA, the 30-day timeline to initiate rulemaking will be difficult to meet and could affect NOAA Fisheries' ability to prioritize its most important species conservation work.

Interagency Cooperation

The changes to section 7 of the ESA proposed in the ESA Amendments Act of 2024 were both addressed and discussed in detail in rulemaking, most recently the amendments to 50 CFR 402 effective May 6, 2024. Defining 'Environmental baseline' alone, without the other components of a biological opinion, would result in a definition of a term that is otherwise not mentioned in the Act itself. Additionally, the proposed language modifying incidental take statements, specifically reasonable and prudent measures in 7(b)(4)(ii), is inconsistent with the stated purposes of the Act. As discussed in our recent rule making, we feel relying on the regulatory restrictions of the minor change rule (50 CFR 402.14(i)(2)) provide more concrete limitations on the extent of reasonable and prudent measures than the language proposed.

For these reasons, we believe the suggested changes to section 7 are more appropriate in regulation rather than as amendments to the Act.

Other Provisions of the ESA Amendments Act of 2024

Section 303 would exempt from judicial review a decision to delist a species during the 5-year monitoring period for delisted species. NOAA Fisheries has concerns about this provision. The 5-year monitoring time period represents a significant period of time in which the status of the species could be greatly impacted if a premature or incorrect decision was made to delist the species.

Section 401 would require the Services to make publicly available on the internet the best scientific and commercial data available that are used as the basis for each regulation to list species under the ESA. The Services listing decisions are based on the best available scientific and commercial data. The literature, studies, and other relevant data used in status reviews and listing determinations are discussed and referenced in NOAA Fisheries listing determination and status review documents. However, there may be limitations to the posting on the internet of certain data if the information falls within one of the exceptions to disclosure under the Freedom

of Information Act. In these cases, NOAA Fisheries would refer the requester to the party from which the data originated. In addition, in its status reviews and listing determinations, NOAA Fisheries often relies on peer-reviewed published literature that may be a synthesis or analysis of data that are summarized by the prevailing scientific expert or author of the paper. In these circumstances, NOAA Fisheries relies on the expert evaluation and analysis of the data and may not have in its possession or be able to obtain the underlying data.

Section 402 would require the Services to provide all the data upon which a listing decision is based to the States before a listing decision is made. This would be a complicated and burdensome requirement for NOAA Fisheries that would hinder our ability to meet statutory deadlines for listing decisions because many of the ESA listed species under NOAA Fisheries' jurisdiction are highly migratory with a range across a multitude of states.

This section would also define the best scientific and commercial data available to include all data submitted to the Secretary by a State, Tribal, or county government. This provision is problematic. While NOAA Fisheries relies on the best available scientific and commercial data that often includes data submitted by states, Tribes or county governments, those data do not inherently constitute the best available scientific and commercial data. NOAA Fisheries evaluates those data, along with all other data, to identify the best available data. Mandating the Services to automatically rely on these data in making its listing decisions, could lead to species listing decisions that are not actually based on the best available scientific and commercial data as the statute requires. In addition, defining all data submitted by states or counties as the "best available," would create a quandary if there were conflicting data from such sources.

Section 403 would require the Secretaries of the Interior and Commerce to provide an annual report to Congress detailing litigation expenditures from agencies within their respective Departments within 90 days of fiscal year end. Agencies would need to provide the Secretary with detailed information, including a description of the claims; the amounts of resources expended responding to notices of intent to sue letters and all other actions in preparation of or related to litigation, as well as attorney's fees awarded and the basis for such awards. NOAA Fisheries does not track its resources in this manner. This provision would require NOAA Fisheries to revise its accounting systems to track and report on this information, diverting resources from NOAA Fisheries' conservation priorities.

Conclusion

NOAA is proud to continue to be a leader in conducting ocean science, serving the nation's coastal communities and industries, and ensuring responsible stewardship of our ocean and coastal resources. We value the opportunity to continue working with this Subcommittee on these important issues. NOAA supports optimizing species conservation and recovering listed species. NOAA strongly opposes the ESA Amendments Act of 2024 because of our concerns

with the provisions that would diminish our ability to work effectively and efficiently to conserve and recover threatened and endangered species.