TESTIMONY OF MARJORIE MULHALL
LEGISLATIVE DIRECTOR FOR LANDS, WILDLIFE, AND OCEANS
EARTHJUSTICE

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

LEGISLATIVE HEARING ON H.R. 925, H.R. 1747, H.R. 2748, H.R. 2854, H.R. 2918, H.R. 2956, H.R. 3399, H.R. 4340, H.R. 4341, AND H.R. 4348

SEPTEMBER 24, 2019

Good afternoon Chairman Huffman, Ranking Member McClintock, and Members of the Subcommittee:

My name is Marjorie Mulhall, and I am the legislative director for lands, wildlife, and oceans at Earthjustice, the nation's oldest and largest non-profit environmental law organization. Thank you for inviting me here today to discuss the "Protect America's Wildlife and Fish in Need of Protection Act of 2019" or the "PAW and FIN Act of 2019" (H.R. 4348) and other important legislation to protect imperiled wildlife.

My testimony addresses the success and importance of the Endangered Species Act (ESA), particularly in light of the current biodiversity crisis facing our planet. I will also discuss the alarming implications of the Trump Administration's ESA regulatory rollbacks and the critical need for H.R. 4348 to preserve congressional intent behind the ESA and to protect this vital law.

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 our fellow species. 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] Congress specifically defined "conservation" under the ESA in a sweeping manner, as "the use of all methods and procedures which are necessary to bring any endangered species to the point at which the measures provided pursuant to this act are no longer necessary," that is, when the species have recovered and no longer need the protection of the ESA.[2]

As highlighted by the Supreme Court 40 years ago, the clear intent of Congress in enacting the ESA "was to halt and reverse the trend toward species extinction, whatever the cost. This overarching purpose is reflected not only in the stated policies of the ESA, but in literally every section of the statute."[3] This commitment by Congress resulted in "the most comprehensive legislation for the preservation of endangered species enacted by any nation."[4]

[1] 16 U.S.C. § 1531(b).
[2] 16 U.S.C. § 1532(3).
[3] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).
[4] *Id.* at 180.

Overall, the ESA seeks to protect and recover imperiled species and populations by listing them as threatened or endangered based on five statutory factors, based solely on the "best scientific and commercial data available.[5] The ESA defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range."[6] 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."[7] At the same time that a species is listed as threatened or endangered, the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (the two agencies charged with administering the Act) must designate and protect critical habitat for the species, defined as areas that are essential for the survival and recovery of the species.[8]

Today, the ESA protects more than 1,600 plant and animal species in the U.S. and its territories, and millions of acres have been designated as critical habitat to allow for species' survival and recovery. Since its enactment, the ESA 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.[9]

The incredible success of the ESA is all the more impressive given that the Act has been chronically underfunded for decades. Congressional appropriations for recovery, consultation, and other important programs under the ESA have not been nearly sufficient to keep up with the number of species that have, or need, the Act's protections, nor the increased complexities of a world facing climate change and a host of other environmental challenges. Thankfully, the FY 2020 House Interior/EPA appropriations bill, H.R. 3052, contains much-needed increases to recovery, consultation, and other ESA programmatic budgets. We are grateful for these increases and urge the Senate to include the same increases for ESA programs as those contained in the FY 2020 House bill.

2. THE CURRENT BIODIVERSITY CRISIS

The ESA is our nation's best defense against extinction threats, and unfortunately the Act is needed more now than ever. Leading scientists report that we are in the midst of a mass extinction crisis, with extinction rates now at the highest point since dinosaurs were wiped off the face of the earth 65 million years ago. It is widely agreed that this mass die-off, the sixth our planet has experienced, is largely the result of human activity – including significant ecological impacts from climate change. These threats to our planet's biodiversity endanger not only ecosystems but also our own survival as a species, as healthy ecosystems provide services that sustain societies while also adding billions of dollars to the U.S. economy each year.

The U.N.'s Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) released a landmark global assessment of the planet's biodiversity earlier this year, and the findings by a team of 145 scientists from across 50 countries were highly alarming. Approximately

[5] 16 U.S.C. § 1533(b).
[6] 16 U.S.C. § 1532(6).
[7] 16 U.S.C. § 1532(20).
[8] 16 U.S. C. § 1532(5)(a).
[9] Tulchin Research, Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters Nationwide, July 6, 2015, *available at* http://www.defenders.org/publications/Defenders-of-Wildlife-National-ESA-Survey.pdf.

one million plant and animal species are on the verge of extinction, many within decades.[10] And, in the absence of urgent action to reverse this trend, there will be a further acceleration in the rate of species extinctions, which is already tens to hundreds of times higher than average over the past 10 million years.[11] According to IPBES Chair Sir Robert Watson, "the overwhelming evidence of [this report] presents an ominous picture. The health of ecosystems on which we and all other species depend is deteriorating more rapidly than ever. We are eroding the very foundations of our economies, livelihoods, food security, health, and quality of life."[12]

In addition to losing a frightening number of species altogether to extinction, scientists warn that we are losing large numbers of individuals within species that are not yet extinct and in some cases not yet close to extinction. A 2017 study found that, of 27,600 species studied, nearly one-third of species were shrinking in population numbers and that the territorial ranges of these species were dwindling as well.[13] This study also found that "as much as 50% of the number of animal individuals that once shared Earth with us are already gone, as are billions of populations."[14] And a new study published just last week that indicates that since 1970, bird populations in the United States and Canada have declined by 29 percent, or almost 3 billion birds.[15] This distressing decline in abundance of individuals within species has major implications for the ecosystem services our web of life depends on – everything from pollination to nutrient cycling and water quality.

3. THE TRUMP ADMINISTRATION'S ESA REGULATORY ROLLBACKS

In the midst of the current biodiversity crisis we should be working to strengthen, not weaken, our nation's best tool for helping to prevent extinction. Unfortunately, the Trump Administration has taken a major step in the wrong direction by adopting a set of three ESA regulatory revision packages aimed at eliminating alleged "unnecessary regulatory burdens."[16] These ESA regulatory changes, which FWS and NMFS (together, "the Services") finalized on August 12, 2019,[17] violate the ESA, weaken its implementation, and undermine its purpose of conserving imperiled species and the ecosystems upon which they depend.[18]

The Trump Administration's finalized ESA regulations take direct aim at two vital portions of the Act, Sections 4 and 7. Section 4, which Congress has labeled the "cornerstone of effective

---

[10] IPBES. 2019. Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, at 4, *available at* https://www.ipbes.net/system/tdf/ipbes_7_10_add-1-_advance_0.pdf?file=1&type=node&id=35245.
[11] *Id.*
[12] IPBES, Media Release: Nature's Dangerous Decline "Unprecedented"; Species Extinction Rates "Accelerating", May 6, 2019, *available at* https://www.ipbes.net/news/Media-Release-Global-Assessment.
[13] Proceedings of the National Academy of Sciences of the United States of America, "Biological annihilation via the ongoing sixth mass extinction signaled by vertebrate population losses and declines," Aug. 8, 2017, *available at* https://www.pnas.org/content/114/30/E6089.full.
[14] *Id.*
[15] Science, "Decline of the North American avifauna," Sept. 19, 2019, *available at* https://science.sciencemag.org/content/early/2019/09/18/science.aaw1313
[16] 82 Fed. Reg. 12,285 (Mar. 1, 2017).
[17] Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 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 (Aug. 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 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 424).
[18] 16 U.S. C. § 1531(b).

implementation" of the Act,[19] contains provisions for species listing and designation of critical habitat. Section 7 lays out the responsibilities for federal agencies under the Act and requires that every federal agency obtain review and clearance for their activities that may affect listed species or critical habitat. If an activity authorized, funded, or carried out by a federal agency "may affect" a listed species or its designated critical habitat, that activity cannot go forward until consultation (a biological review of the proposal by FWS or NMFS) ensures that it will not "jeopardize" the species or result in the "destruction or adverse modification" of designated critical habitat.[20]

Due to their concerning implications for imperiled species, the Trump Administration's ESA regulatory proposals have been roundly criticized at every turn. During the 2018 comment period when the regulatory revisions were first proposed, 105 U.S. Representatives, 34 U.S. Senators, 11 states, and more than 800,000 individuals weighed in with opposition comments. Further, media coverage of these regulations, both in proposed and final form, has been largely critical.[21] Detailed below are some of the most concerning ways that these new regulations weaken the ESA and contravene congressional intent behind this law.

a. Injecting economic consideration into what Congress mandated be purely science-based decisions about listing imperiled species.

The ESA requires that listing decisions to protect endangered and threatened species be made "solely on the basis of the best scientific and commercial data available."[22] Congress added the word "solely" in its 1982 amendments to the Act to underscore that non-scientific considerations should play no role in listing decisions.[23] The Services' final regulation deletes from 50 C.F.R. § 424.11(b), which is the Services' regulation establishing listing factors, the phrase "without reference to possible economic or other impacts."

The clear intent of Congress in enacting the ESA "was to halt and reverse the trend toward species extinction, *whatever the cost*. This is reflected not only in the stated policies of the ESA, but in literally every section of the statute" (emphasis added).[24] Yet, with this regulatory change, the Services now indicate that they intend to compile economic information on listings decisions while "affirming that [the Services] will not consider information on economics or other impacts in the course of the listing determinations."[25] It is difficult if not impossible to conceive why these resource-strapped agencies would go to the trouble to compile economic data on listing decisions, only to then somehow not be influenced by the data itself, or by stakeholders' feelings about that

[19] S. Rep. No. 97-418, at 10 (1982).
[20] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).
[21] *See, e.g.*, Editorial, *Don't Drive Endangered Species Act into Extinction*, USA Today (Aug. 1, 2018), https://www.usatoday.com/story/opinion/2018/08/01/dont-drive-endangered-species-act-into-extinction-editorials-debates/863548002/; Editorial, *Protect Endangered Species. Period.*, Chicago Trib. (Aug. 2, 2018), https://www.chicagotribune.com/opinion/editorials/ct-edit-endangered-species-trump-20180723-story.html; Editorial, *Trump Takes Aim at Endangered Species*, Minneapolis Star Trib. (Aug. 20, 2019), http://www.startribune.com/trump-takes-aim-at-endangered-species/557256172/; Editorial, *The Species Act, Endangered: 'Like a Plan From a Cartoon Villain'*, N.Y. Times (Aug. 17, 2019), https://www.nytimes.com/2019/08/17/opinion/endangered-species-act-trump.html.
[22] 16 U.S.C. § 1533(b)(1)(A).
[23] Pub. L. No. 97-304, 96 Stat. 1411; *see also* H.R. Rep. No. 97-567, at 19 (1982) (noting that the term "solely" was added to emphasize that listing determinations were to be made "solely upon biological criteria and to prevent non-biological considerations from affecting such decisions").
[24] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).
[25] Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. at 45025.

economic data. This opening of the door to economic considerations threatens to politicize what the law requires to be science-based listing decisions, and it violates the text and purpose of the ESA.

b. Depriving newly listed threatened species from automatically receiving protections from killing and other forms of harm and commercial exploitation.

Section 9 of the ESA lays out prohibitions against "take" of endangered species. Take is defined to include "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[26] In 1975, two years after Congress enacted the ESA, FWS exercised its authority under section 4(d) to extend this Section 9 take prohibition to all threatened species as well.[27] This rule created the default presumption that a threatened species would automatically receive all anti-take protections provided to endangered species, unless and until FWS promulgated a species-specific rule that changed those protections. The automatic protection for FWS-managed threatened species is known as the "blanket 4(d) rule."

FWS found that providing threatened species with automatic take protection, rather than reserving those protections solely for endangered species facing imminent extinction, allowed the agency to work towards halting the slide of threatened species to endangered status. And this approach allowed the agency to protect threatened species while working on a species-specific rulemaking. FWS noted that the presumption of complete protections for threatened species, along with the ability to tailor protections if need be with a specific 4(d) rule, constituted "the cornerstone of the system for regulating threatened wildlife."[28]

The Trump Administration's ESA regulatory revisions eliminate FWS's blanket 4(d) rule. Any species listed or reclassified as threatened in the future "would have protective regulations *only if* the Service promulgates a species-specific rule" (emphasis added). Repealing the blanket 4(d) rule for newly listed threatened species will add to FWS's workload and backlog because FWS will now have to create additional 4(d) rules for each species newly listed as threatened – that is, assuming these species are to have any protection from take at all. And, despite FWS's assertions that it will simultaneously issue species-specific 4(d) rules when listing threatened species, the Service refused to adopt any actual requirement for issuing 4(d) rules concurrent with listing, which will leave threatened species unprotected.

One need only look to NMFS, which has never employed a blanket 4(d) rule, to see the alarming way in which FWS's regulatory change threatens newly listed threatened species. NMFS manages only 67 threatened species compared to FWS's 328 yet has failed to provide species-specific protections for the threatened species under its care. For example, NMFS designated 20 species of coral as threatened in 2014 but has still not issued a 4(d) rule to protect these species from actual harm. Further, currently less than a quarter of the more than 300 FWS-managed threatened species have received species-specific 4(d) rules. In short, rescission of FWS's blanket 4(d) rule reverses the presumption of protection that has long applied to threatened species. It provides no additional conservation benefits, as the existence of the blanket 4(d) rule does not prevent or impede FWS from tailoring species-specific protections for threatened species as it sees fit.

[26] 16 U.S.C. § 1532(18).
[27] 50 C.F.R. § 17.31(a) (2018); Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,111, 44,425 (Sept. 26, 1975).
[28] 40 Fed. Reg. at 44,414.

c. Allowing agencies to rely on promises of vague or uncertain steps to minimize harm to listed species to justify taking actions that harm species.

Section 7(a)(2) of the ESA directs all federal agencies to ensure that any action they authorize, fund, or otherwise carry out will not jeopardize the continued existence of an endangered or threatened species nor result in the destruction or adverse modification of designated critical habitat.[29] To accomplish this, federal agencies must request from FWS and/or NMFS a list of species and critical habitat that may be in the project area. Federal agencies then must determine whether their actions may affect any of those species or their critical habitat. If the action will not affect listed species or their critical habitat, no further consultation is needed. If protected species or habitat *may* be affected, consultation with the pertinent Service(s) is required. This consultation occurs either informally or through a formal consultation that culminates in a Service-written biological opinion document provided to the federal action agency.

During formal consultation, the Services have an obligation to "use the best available scientific and commercial data available and give appropriate consideration to beneficial actions taken by the Federal agency" in formulating their biological opinions and associated mitigation measures to minimize incidental take of the species.[30] Courts have held for nearly thirty years that the Services cannot rely on an agency's plans to undertake mitigation measures that are uncertain to occur or succeed in order to reach a "no-jeopardy" conclusion for the agency's action. The Ninth Circuit has specifically held that a no-jeopardy conclusion based on mitigation measures must include "specific and binding plans" with a "clear definite commitment of resources for future improvements."[31]

For purposes of rendering a no-jeopardy opinion or finding that a proposed action does not destroy or adversely modify critical habitat, the Trump Administration's ESA regulatory changes allow the consulting agency (FWS or NMFS) to rely on an action agency's claim that it will mitigate any incidental take without requiring any demonstration of specific binding plans. The Services justify this change by asserting that "judicial decisions have created confusion" about the level of certainty required for mitigation measures. But the decisions the Services point to (and many more) have, consistent with Congress's intent, been uniform in holding that mitigation measures cannot be relied on to avoid a jeopardy determination unless those measures are sufficiently concrete, specific, and certain to occur.

d. Raising the bar on what constitutes destruction or adverse modification of critical habitat.

As discussed above, Section 7 of the ESA requires all federal agencies to ensure that any action they authorize, fund, or otherwise carry out will not jeopardize the continued existence of a listed species nor result in the destruction or adverse modification of designated critical habitat.[32] The Trump Administration's ESA regulatory changes contain a new definition of "destruction or adverse modification" of critical habitat that requires the scale of the impacts to be relative to the value of critical habitat "as a whole." However, the purpose of establishing critical habitat is for the government to delineate specific territory that is not only necessary for the species' survival but also *essential* for the species' recovery. Because critical habitat designations already represent the area

[29] 16 U.S.C. § 1536(a)(2).
[30] 50 C.F.R. § 402.14(g)(8), 402.02.
[31] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935-36 (9th Cir. 2008).
[32] 16 U.S.C. § 1536(a)(2).

essential for the survival and recovery of species, adding "as a whole" conflicts with the ESA's plain language and focus on recovery.

The effect of this definitional change will likely be a "death by a thousand cuts" undermining of protections, with the Services finding that smaller-scale projects do not adversely modify critical habitats and leading to piecemeal destruction of essential habitat for listed species.

This definitional change is especially concerning for highly migratory or wide-ranging species that require large amounts of designated critical habitat. The "as a whole" language also disregards circumstances where the Service has designated critical habitat necessary for certain functions, such as dispersal or breeding habitat. The final regulations do not capture these important nuances nor require an analysis that would ensure the Services' conclusions are based on such biologically important distinctions.

4. IMPORTANCE OF THE "PAW AND FIN ACT OF 2019" (H.R. 4348)

The Trump Administration's ESA regulations undermine the strength of and contravene the intent behind this vital law. Thankfully, Representatives Grijalva, Beyer, and Dingell and other leaders in the House and Senate, have introduced the "PAW and FIN Act of 2019" (H.R. 4348), which would repeal these damaging regulations and preserve congressional intent behind the ESA while protecting the Act itself. Earthjustice is very glad to support this important legislation, as well as other important pro-wildlife legislation before the Subcommittee today, including the "Extinction Prevention Act" (H.R. 2918); the "Safeguarding America's Future and Environment Act" (H.R. 2748), and legislation to prohibit the use of neonicotinoids in national wildlife refuges (H.R. 2854).

In this time of alarming biodiversity loss, we need a strong, fully funded, and actively enforced ESA more than ever. The ESA is wildly successful and popular, and it is our nation's best defense against the extinction crisis. Earthjustice urges Congress to protect and adequately fund this vital law.