

Testimony

of

**JAMIE RAPPAPORT CLARK
PRESIDENT & CEO
DEFENDERS OF WILDLIFE**

before the

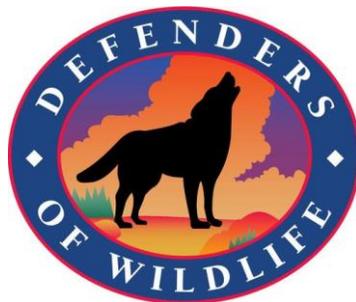
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

U.S. SENATE

on

S. 4589, THE ENDANGERED SPECIES ACT AMENDMENTS OF 2020

September 23, 2020



Good morning Chairman Barrasso, Ranking Member Carper and Members of the Committee:

My name is Jamie Rappaport Clark and I am the President and CEO of 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 70 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. More recently, we launched the Center for Conservation Innovation to pioneer innovative, pragmatic solutions to enhance the effectiveness of endangered species conservation in the United States. We represent more than 1.8 million members and supporters throughout the United States

Before coming to Defenders of Wildlife, I spent 20 years working in conservation as a wildlife biologist in the federal government, first at the Department of Defense and then at the Department of the Interior. From 1997 until 2001, I served as the Director of the U.S. Fish and Wildlife Service (FWS) under President Bill Clinton. In that role, I oversaw the implementation of the Endangered Species Act (ESA or the Act) and presided over the recovery and delisting of key endangered species including the bald eagle, the Aleutian Canada goose and the peregrine falcon. During my confirmation hearing before this committee more than 20 years ago, I pledged to increase the FWS's role in cooperative approaches to species conservation. I firmly believe that involving stakeholders and other federal, state and tribal agency expertise early on reaps long-term benefits for fish and wildlife resources and the economy. Thank you for inviting me here today to speak about my experience conserving imperiled wildlife under the ESA.

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, the United States should lead the way. We need a new comprehensive national strategy with supporting policies focused on stemming the loss of biodiversity. The policy should articulate the nation's commitment to a whole-of-government response to tackling species extinction, calling forth a coordinated effort from many different federal agencies, working in collaboration with states, tribes, landowners and other stakeholders, to address the primary threats to biodiversity, ecosystem services and nature.

The national commitment to combatting the biodiversity crisis must start with maintaining and strengthening the ESA, the visionary law that establishes the nation's commitment to conserving and recovering imperiled species. Senator Barrasso's bill, S. 4589, the "Endangered Species Act Amendments of 2020," would unfortunately take us the wrong direction at this critical moment for our planet.

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. Last year, 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.ⁱ In North America alone, nearly 3 billion birds have disappeared since 1970.ⁱⁱ 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.ⁱⁱⁱ 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 week, the United Nations Convention on Biological Diversity released an sobering report announcing that the international community is not doing enough to adequately safeguard and restore biodiversity.^{iv} As part of the United Nations Decade on Biodiversity 2011-2020, more than 150 countries created a list of 20 targets aimed at improving the status of biodiversity. While some progress has been made over the past 10 years, the world has failed to fully achieve a single target, signaling the need to act urgently and place biodiversity at the center of our decision making.

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 country will endure and our planet will sustain our priceless natural legacy – our rich abundance of wildlife and awe-inspiring landscapes – for all generations. If we do not act now, the consequences to our society from the loss of species and ecosystem services will be dire. We must urgently develop and deploy solutions to address the root causes of biodiversity loss: (1) destruction of habitat from development; (2) overexploitation of wildlife; (3) climate change; (4) pollution; and (5) invasive alien species.

The Need for a National Biodiversity Strategy

The biodiversity crisis is not a far-away problem: it is unfolding here and now in the United States. Habitat is being lost at an alarming rate; climate change is visibly harming natural systems; pollution, invasive species and overexploitation are all taking their toll in serious and devastating ways. The U.S. has not developed a broad strategic vision to tackle these challenges, despite overwhelming evidence of the profound impact they will collectively have on our nation. Decades of underfunding and stagnating policies have meant that many conservation needs have been left unmet. For way too long, we have treated wildlife and natural resources as if they were inexhaustible. Our account with Nature is now overdrawn. For our own sake, and the sake of future generations—as well as wildlife itself—it is time to pay our outstanding debt.

To address the drivers of biodiversity loss, ensure society’s security and re-establish the U.S. as a global leader in biodiversity conservation, we must establish a national policy of protecting biodiversity and direct federal agencies to use their authorities to advance that goal by preserving habitat, curbing overexploitation of wildlife, and addressing climate change, pollution and invasive species. The national policy should set a goal of protecting at least 30% of the nation’s lands and

ⁱ 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>.

ⁱⁱ Rosenberg, L. V. et al. 2019. “Decline of the North American avifauna.” *Science* 366 (6461): 120-124.

ⁱⁱⁱ Diaz, S. et al. 2019.

^{iv} Secretariat of the Convention on Biological Diversity. 2020. “Global Biodiversity Outlook 5.” Montreal.

waters by 2030 to protect biodiversity and stabilize our climate (“30x30”).^v This goal will serve as a foundation for eventually protecting half of the nation’s lands and waters by 2050.

The national strategy for protecting biodiversity and ecosystem services should provide clear guidance on how the nation should set goals, make plans and take collaborative action across boundaries to address threats to biodiversity and ecosystem services. The strategy should also recommend ways to improve protections under existing conservation laws and policies, as well as identify new ones that may be needed. As part of this approach, we must commit to strengthening the ESA, deepening protection of biodiversity on federal lands, expanding private lands conservation programs, providing incentives for conservation action, and encouraging collaboration among federal, state, tribal and private stakeholders. In doing so, we will protect our nation’s natural legacy for today and for future generations and reestablish the United States as a global conservation leader.

The Endangered Species Act

Fortunately, we have a strong foundation on which to build such a national commitment to conserving biodiversity. More than 45 years ago, Congress established in the ESA the national goal of protecting all species and the ecosystems on which they depend. The ESA is the nation’s 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. However, woeful underfunding and inconsistent implementation have rendered it less effective than Congress envisioned. With proper funding and political support, the ESA can achieve its full potential in protecting our most imperiled plants and animals and address the threats we are now focused on.

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 sound and needs no change. For the ESA to work, however, the agencies charged with overseeing and implementing it must have the political will and necessary resources to achieve its visionary purposes and goals. Congress must provide adequate resources – not change the structure of this successful and popular law – to help realize the ESA’s full potential and meet the threat of the looming biodiversity crisis.

The Endangered Species Act Amendments of 2020

The bill before the Committee today does not strengthen the ability of the ESA to conserve imperiled species. At a time when we should be redoubling our commitment to protect biodiversity and stop extinction, Senator Barrasso’s 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.

^v Rosa, Lindsay, and Jacob W. Malcom. 2020. “Getting to 30x30: Guidelines for Decision-Makers.” Washington, D.C.: Defenders of Wildlife. <https://defenders.org/sites/default/files/2020-07/getting-to-30x30-guidelines-for-decision-makers.pdf>.

There are numerous provisions in the bill that would weaken the ESA and lead to decreased protections for threatened and endangered species, ultimately condemning them to continued slow declines and challenges. It would significantly rewrite key portions of the ESA to prioritize politics over science, and inappropriately shift responsibility for key implementation decisions 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, both state and federal. It would turn the current process for listing and recovering threatened and endangered species into a far lengthier and less transparent process that precludes public and judicial review of key decisions.

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

If Enacted, the Bill Would Inappropriately Shift Responsibility for Implementing the Endangered Species Act to the States

The proposed bill seeks to dramatically reshape the states' role in implementing and administering the ESA, forcing the FWS and the National Marine Fisheries Service (the Services) to defer to the states in many cases when implementing the Act. The bill would require the Secretaries of the Interior and Commerce (the Secretaries) to acknowledge the "primary authority" of state agencies to manage fish and wildlife, and calls for the Secretaries to figure out how to somehow consult with states more than "the maximum extent practicable." In this bill, states are given control over key decisions under the ESA; decisions by a recovery team to modify recovery goals for a species, for example, would require approval by $\frac{3}{4}$ of the state representatives on the recovery team. And as I note below, states and landowners are given one-sided preferential treatment in judicial review.

Perhaps the most concerning aspect of the bill's attempt to elevate state interests relates to recovery planning and implementation. Under the ESA as currently written, the federal government has principal responsibility to develop recovery plans for listed species, though it can and does coordinate with states, local governments, scientists, industry, and nonprofit groups in developing and carrying out such plans.^{vi} Section 203 of the bill at issue would change this, requiring the Services to allow the states to "lead recovery planning and implementation" and giving them an outsized role in developing recovery goals and recovery plans. Given that a quarter of ESA-listed species are known to occur in two or more states and the challenges of coordinating recovery under different states' laws, federal leadership of recovery planning and implementation is particularly important. What if New Mexico grants some authority that Arizona does not for taking the steps necessary for recovery of a species like Mexican gray wolf? Or if one state wants a lower number of wolves than the other because it's politically easier, regardless of the species' needs.

The bill's provisions relating to implementation plans, which the bill proposes as a new mechanism to carry out recovery plans, are particularly concerning. Under Section 203 of the bill, the Services would be required to designate states as implementation plan leads. Thereafter, the states would have the authority to unilaterally change implementation plan provisions without Service approval or even oversight.

^{vi} 16 U.S.C. § 1533(f).

States already play an important role in helping determine the fate of species, both before and after they are listed. The ESA was passed in 1973 as a law of last resort for species conservation, in order to prevent species from going extinct. Until species are designated as threatened or endangered, the states play the primary role in managing and conserving wildlife, fish, and plant species within their borders. It is only after species have reached the threshold where they are likely to become extinct that the ESA's protections come into effect, and this is often after decades of state management and conservation efforts have proven insufficient to stop the species slide towards extinction.

Even after species are listed as threatened or endangered, the states still play an important role as collaborative conservation partners, and participate in recovery planning, including developing conservation plans and agreements.^{vii} States routinely help both develop and implement recovery goals for listed species, collaborate with the Services on conserving threatened, endangered, and candidate species, and can receive federal funding to carry out such activities.

However, the ultimate responsibility for ensuring the ESA meets its national commitment to conserving species rests with – and should remain with – the federal government. The states broadly lack the authorities and resources needed to carry out the conservation of threatened and endangered species; for example, Wyoming and West Virginia lack any endangered species statutes.^{viii,ix} Only a small number of states even give state agencies the authority to promote the recovery of imperiled species, and most states do not protect all animal and plant species listed under the ESA under state law.^x The current federal role in leading implementation of the ESA has proven effective when properly administered and funded. Shifting responsibility to the states would subject actions like recovery planning and implementation to individual state politics and sentiments and could burden often underfunded and understaffed state wildlife agencies. Despite the fact that the ESA is widely popular with voters across the political spectrum, some states have shown a lack of political will to protect endangered species or are openly hostile to their protection. Giving the states dominant roles in every aspect of the implementation of the ESA is a recipe for disaster.

The Bill Would Raise Barriers to Listing Species, While Removing Barriers to Delisting Them

At the heart of the ESA are the listing provisions of section 4, which require the Secretaries to designate species as threatened or endangered.^{xi} Such designations bring those species under the protections of the Act, particularly the prohibitions against take.^{xii} This bill would significantly weaken those protections, delaying listings and making it easier to delist species.

^{vii} See U.S. Fish and Wildlife Service, “Interagency Policy Regarding the Role of State Agencies in ESA Activities, Last updated Feb. 22, 2016, <https://www.fws.gov/endangered/laws-policies/policy-state-agencies.html>.”

^{viii} Camacho AE, Robinson-Dorn M, Yildiz AC, Teegarden T. 2017. Assessing State Laws and Resources for Endangered Species Protection Comments. *Environmental Law Reporter News & Analysis* 47:10837–10844.

^{ix} Kurose S, Hartl B, Greenwald N. 2019. Unready and ill-equipped: How State Laws and State Funding Are Inadequate to Recover America's Endangered Species.

^x *Id.*

^{xi} 16 U.S.C. § 1533(a)(1).

^{xii} 16 U.S.C. § 1538(a)(1).

Most notably, the bill would remove the statutory deadlines placed on the Services to respond to listing petitions. Instead of the current 12-month deadline to decide whether to list a species, the Services would be compelled to work positive decisions to list into a seven-year “national listing work plan,” where the species is given a priority number that determines when the Services will actually list these species. For several of those priority classifications, the Services would be given the option to extend deadlines up to five years, meaning that listing protections can be delayed for years and years as a species moves closer to extinction – or goes extinct. Imagine if 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.

The Proposed Bill Would Remove Public Accountability and Transparency from the Act

The ESA is strongly supported by the American public, with 4 out of 5 Americans supporting the Act.^{xiii} In enacting the ESA, Congress empowered the public to ensure that the Services are properly administering the law’s provisions through citizen suits.^{xiv} This bill proposes to significantly reduce public accountability and transparency, weakening public oversight of how federal and state wildlife agencies are carrying out their responsibilities under the law.

For some important decisions under the ESA, the bill would remove or delay judicial review, an essential part of the checks and balances within the federal government. When species are added to the Services’ “national listing work plan” and assigned a priority number, that decision would not be subject to judicial review. Moreover, when the Services delist a species, removing it from the protections of the ESA, the bill would prevent the courts from evaluating that decision until after five years of post-delisting monitoring had been carried out, no matter how flawed the initial decision to delist. During that time the species could be at risk of extinction or even become extinct. These provisions appear aimed at blocking conservation group lawsuits from seeking judicial relief where a species is removed from protection under the ESA while giving industry and other affected parties carte blanche to challenge the Services’ actions if it declines to delist or downlist a species. In cases where the public can still challenge agency actions under the ESA, the bill would put an arbitrary thumb on the judicial scales by declaring that efforts by state, tribal, an even local governments to intervene in ESA cases should presumptively be granted and requiring that such parties be automatically included in all settlement discussions.

The bill would also ensure that the Services and states could make decisions that could significantly impact the survival of listed species without providing the opportunity for public comment, including changing recovery goals or creating or modifying an implementation plan. At the same time the bill requires the federal government to directly solicit and fully consider state comments on listing petitions, it also forces the federal government to withhold disclosing information contained in such comments if the states claim their laws protect such information. These provisions together would allow affected parties to easily shield important information about their activities from disclosure – including information that is essential to the public’s understanding of, for example, whether habitat conservation plans or conservation agreements are working as intended.

^{xiii} Bruskotter JT, Vucetich JA, Slagle KM, Berardo R, Singh AS, Wilson RS. 2018. Support for the U.S. Endangered Species Act over time and space: Controversial species do not weaken public support for protective legislation. *Conservation Letters* 11:e12595.

^{xiv} 16 U.S.C. §§ 1540(g).

These heavy-handed attempts to exclude the public from holding agency – and state – officials accountable for sound decision making are contrary to the rule of law and expose species to the threat of arbitrary and unreviewable actions that could jeopardize their existence.

The Candidate Conservation Agreement with Assurances Provisions of the Bill Would Weaken the ESA’s Core Protections

The Services regularly develop candidate conservation agreements with assurances (CCAAs) under their authority to grant permits for taking species otherwise protected by the ESA’s anti-take provisions.^{xv} CCAAs cover candidate species, or species that have not been listed yet, and are designed to address the identified threats and conserve the species with the goal of averting the need for ESA protections. 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. While CCAAs offer a promising way to protect species before they reach the point where listing is necessary, 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.^{xvi} A recent audit of an existing multi-state CCAA covering the lesser prairie-chicken found that the CCAA was not meeting its conservation goals, and that as written did not allow the U.S. Fish and Wildlife Service to properly assess the CCAA’s performance.^{xvii}

This bill does not strengthen the CCAA program. It inappropriately gives it undue weight when implementing other parts of the ESA as well. For example, the bill will require the Services to factor in the existence of CCAAs or other conservation agreements covering a species when considering whether to list that species as threatened or endangered. The bill would also require the Services to abide by the terms of all CCAAs entered into prior to March 27, 2017, no matter how effective – or ineffective – such CCAAs have proven to be. The CCAAs I noted before for the lizard and the prairie-chicken were entered into prior to the bill’s March 27, 2017 cut-off, and the bill would thus require the U.S. Fish and Wildlife Service to abide by the terms of these CCAAs that have clearly been demonstrated not to work.

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. Turning the tide on biodiversity loss and addressing climate change will not be easy. Neither will be rebuilding the economy, warding off future pandemics, confronting and remedying systemic racism and injustice, or restoring the integrity of the federal government itself. But our path forward as a society depends on our taking on those tasks.

^{xv} Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32726 (June 17, 1999); Candidate Conservation Agreements With Assurances Policy, 81 Fed. Reg. 95164 (Dec. 17, 2016).

^{xvi} 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.

^{xvii} See Western Association of Wildlife Agencies, “2019 Annual Report for the Range-wide Oil and Gas Candidate 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>

At this critical moment for the biological health of our planet, the nation must renew its commitment to conserving imperiled species and their habitat. An effective national strategy to conserve biodiversity must center on supporting and strengthening the existing legal and policy framework to better protect wildlife, including most importantly the ESA. Any changes to this bedrock law must be judged by whether they actually improve species conservation and stave off species extinctions. Congressional interference in science-based decisions about how to conserve species would only serve to undermine the nation's ability to protect biodiversity.

Regrettably, the legislation being considered today would weaken the ESA and make it harder to achieve the progress we must make to address the alarming rate of extinction our planet is facing.

Thank you for considering my testimony. I would be happy to answer any questions.