



Testimony Regarding H.R. 6355 (PETITION Act) and H.R. 6356 (LIST Act)
Before the U.S. House of Representatives
Committee on Natural Resources

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September 26, 2018

Main Points

- For decades, the U.S. Fish and Wildlife Service has struggled to keep up with a persistent backlog of listing and delisting petitions
- The backlog workplan is a sensible, bipartisan response to this problem
- The public shouldn't have to bring multiple suits to get agencies to listen to their own scientists

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Chairman Bishop, Ranking Member Grijalva, and honorable members of the Committee, thank you for the opportunity to testify on this important issue.

Forty-five years after the Endangered Species Act was enacted, we have learned a lot about how the law works and doesn't work. We can be proud that only 1% of protected species have gone extinct. But we should be equally dissatisfied that only 3% of those species have recovered. We can and must do better. And that requires a combination of reforms. First, bold reforms are needed to improve the incentives for states, property owners, and conservationists to work together toward species recovery.³ And, second, process reforms must address some of the persistent points of conflict that distract from those recovery efforts.

The PETITION Act and LIST Act address two of the most persistent bureaucratic problems in the administration of the Act. In fact, they codify or build on reforms proposed administratively by both the Obama and Trump administrations. Importantly, these reforms will restore the government's ability to focus on the species that most need protection while spurring the delisting of species that no longer require it.

The popular but poorly understood Endangered Species Act

The Endangered Species Act is one of our nation's most popular environmental laws. Surveys routinely reveal broad, bipartisan support.⁴ Almost everyone, regardless of political persuasion, embraces the goals of the Endangered Species Act. However, it's equally clear that most Americans know very little about how the law works and what results it has achieved.

A recent survey by the Association of Zoos and Aquariums, for instance, found that the average American believes there are only 80-100 species on the Endangered Species List.⁵ (There are nearly 1,500.) They do not know that species

³ See, e.g., Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Policy Report (2018).

⁴ See, e.g., Tulcin, et al., *Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters Nationwide*, Tulchin Research Memo (July 6, 2015), available at <https://earthjustice.org/sites/default/files/files/PollingMemoNationalESASurvey.pdf>.

⁵ See Press Release, Association of Zoos and Aquariums, *U.S. Americans Greatly Underestimate How Many Animals on the Endangered Species List, Study Shows* (May 14, 2018), available at <https://www.aza.org/aza-news-releases/posts/us-americans-greatly-underestimate-how-many-animals-on-the-endangered-species-list-study-shows>.

like the bald eagle have recovered, despite the good news being widely publicized.⁶ Nor can many identify popular species that have recently been listed.

This lack of knowledge is understandable. Social scientists have long observed that the public is rationally ignorant of many important issues because time is limited, acquiring information is costly, and the odds that an investment in further knowledge will affect the outcome are extremely low.⁷ If any of us were quizzed on enough public policy topics, we'd inevitably have our own "what is Aleppo?" moment.⁸

Because people care so deeply about the law's purposes, but understandably know little about its operation, any reform—whether a major reworking of the Act or the most minor tweak imaginable—will generate political conflict.⁹ This problem has dogged the agencies charged with implementing the law, regardless of whether the administration is perceived as a friend or foe of environmentalists.¹⁰

We can't even agree on whether the law is a success or failure. Supporters of the Act point to the fact that only 1% of species protected by it have gone extinct,¹¹ while critics note that only 3% of those species have recovered.¹² To anyone not

⁶ See *id.*

⁷ See generally Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter* (2013).

⁸ See Alan Rappaport, 'What is Aleppo?' Gary Johnson Asks, in an Interview Stumble, N.Y. Times (Sept. 7, 2016), available at <https://www.nytimes.com/2016/09/09/us/politics/gary-johnson-aleppo.html>.

⁹ See Tate Watkins, *Changing the Endangered Species Act could actually help conservation*, Wash. Post (July 24, 2018), available at https://www.washingtonpost.com/news/posteverything/wp/2018/07/24/changing-the-endangered-species-act-could-actually-help-conservation/?utm_term=.0ef3d3eb8a24 (noting that environmentalists' views on the Trump administration's proposals ranged from the "sky-is-falling" to seeing opportunities for conservation benefits); Editorial, *Endangered Species Scare*, Wall St. J. (July 26, 2018), available at <https://www.wsj.com/articles/endangered-species-scare-1532646111?mod=searchresults&page=1&pos=5>.

¹⁰ See, e.g., Lydia Wheeler, *Endangered species rule changed, angering environmental groups*, TheHill.com (Sept. 26, 2016), available at <https://thehill.com/regulation/energy-environment/297752-rule-changes-petitioning-process-for-animal-protections> (describing environmental opposition to one minor rule change to the petition process proposed and finalized by the Obama administration).

¹¹ See Lisa Feldkamp, *What has the Endangered Species Act ever done for us? More than you think.*, Nature.org May 8, 2017), available at <https://blog.nature.org/science/2017/05/08/what-endangered-species-act-done-effective-extinction-conservation/>.

¹² See Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform*

entrenched in the conflict, the answer would seem obvious: it's a little of both. The Endangered Species Act provides an effective backstop against species extinction but fails to adequately incentivize recovery efforts.¹³ But such a nuanced view often escapes the debate.

All of this is to say that Congress should heed the public's deep concern for the protection and recovery of endangered species. But it would be a mistake to assume that, because the Endangered Species Act polls well, it is working perfectly and cannot be improved. It can.

The chronic listing backlog and its causes

The Endangered Species Act permits any interested person to petition the U.S. Fish and Wildlife Service or the National Marine Fisheries Service urging the listing or delisting of a species. There is no cost to file a petition and minimal paperwork requirements. In principle, this is a laudable effort to empower anyone to participate in the process, regardless of their resources.

In practice, a handful of well-healed organizations, not plucky citizen-scientists, dominate the petition process. From 2007 to 2011, for instance, two organizations filed 90% of listing petitions, according to the *New York Times*.¹⁴ Together, these two organizations have annual budgets exceeding \$15 million and receive significant amounts in attorney's fees paid by the federal government.

Although a petition is virtually free to the petitioner, the mere filing of one can impose significant costs on the agencies. Even the most patently inadequate petition requires a response that, in the case of the U.S. Fish and Wildlife Service, has a median cost of \$39,276.¹⁵ If the petition indicates that a listing merely *may* be

(2011) (noting the distressingly few number of successful recoveries, several of which cannot directly be attributed to the ESA).

¹³ See Jonathan Wood, *The Endangered Species Two-Step*, PERC Reports vol. 37 (Sum. 2018), available at <https://www.perc.org/2018/07/13/the-endangered-species-two-step/>; see also Tate Watkins, *If a Frog Had Wings, Would It Fly to Louisiana?*, PERC Reports, vol. 37 (Sum. 2018), available at <https://www.perc.org/2018/07/13/if-a-frog-had-wings-would-it-fly-to-louisiana/> (describing the challenges and incredible efforts by the Nature Conservancy to restore habitat for the dusky gopher frog).

¹⁴ Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. Times (Apr. 20, 2011), available at <https://www.nytimes.com/2011/04/21/science/earth/21species.html>.

¹⁵ See, e.g., Department of Interior, *Annual Description of Progress on Listing Actions*, 79 Fed. Reg. 72,450, 72,456 (Dec. 5, 2014).

warranted—a relatively low bar—the agency must expend another \$100,690.¹⁶ Thus, anyone may easily divert a substantial amount of the agency’s resources based on a minimum showing. Where a petition has merit and leads to the recognition of threats to a species, this is a bargain. But that the same resources can be diverted for petitions that don’t merit such expenditures is troubling.

In fact, the greatest burdens are imposed by the weakest petitions because they require greater time and effort to decipher. When the Obama administration proposed reforms to the petition process, it emphasized the difficulty of reviewing weak petitions: “It has often proven to be difficult to know which supporting materials apply to which species, and has sometimes made it difficult to follow the logic of the petition.”¹⁷

This is not merely a question of resources. There is compelling evidence that merely listing a species, without devoting resources to its conservation, may further imperil the species.¹⁸ In other words, resources that would be better spent pursuing species recovery are too often diverted to deciphering weak petitions.

It is no exaggeration to say that federal listing policy is, to a large extent, dictated by the preferences of whoever is most willing to petition and sue, as lawsuits are often required to receive a response to a petition. Science on the threats to a species and the agency’s policy judgment, by comparison, play a reduced role.¹⁹

Until recently, this problem was getting worse. From 1993 to 2007, the U.S. Fish and Wildlife Service received petitions requesting an average of 20 species’ listings per year. From 2008 to 2011, that number skyrocketed to 308 per year. Much of this increase was driven by the filing of “megapetitions,” those urging the listing of dozens or hundreds of species at a time. In 2011, Gary Frazier, the assistant director for endangered species during the Obama administration, bemoaned that these petitions had derailed the process:

[T]hey’re basically going to shut down our ability to list any candidates for the foreseeable future. . . . If all our resources are used responding to

¹⁶ *See id.*

¹⁷ Proposed Revisions to the Regulations for Petition, 80 Fed. Reg. 29,286, 29,287 (May 21, 2015).

¹⁸ *See Adler, supra* n.12, at 13.

¹⁹ *See, e.g.,* Daniel Benjamin, *Public pressure effects species listings*, PERC Reports, vol. 18 (2000), available at <https://www.perc.org/2000/09/01/public-pressure-effects-species-listings/>.

petitions, we don't have resources to put species on the endangered species list. It's not a happy situation."²⁰

Because this problem is the result of the underlying incentives of the petition process, more money may not solve the problem. Any additional listing-budget funds would likely be quickly dissipated by the filing of more petitions. And, because the weakest petitions require greater resources to decipher, it may result in throwing more good money after bad.

In any event, more money is not a politically practical solution. In terms of political priorities, the listing budget is a very low priority.²¹ If given the power to allocate significant new funding, even the most ardent supporters of the Endangered Species Act as currently implemented would likely prioritize other actions, such as active recovery efforts, over pouring more into a bureaucratic process.

Solving this problem would require a better allocation of these costs between the agency and petitioners. The backlog problem is not unique to the Endangered Species Act and Congress' solution to the problem in other contexts could provide a blueprint. To address a long running backlog in the Food and Drug Administration's review of new medicine applications, for instance, Congress brokered a deal by which pharmaceutical companies would bear the costs of those reviews in exchange for a commitment to reduce delays.²² That reform funded a 77% increase in agency staff to review new drug applications and cut approval times in half.²³ Similarly, allowing environmentalists and industry to voluntarily pay for expedited petition reviews under the Endangered Species Act could improve the process for everyone by freeing up agency resources.²⁴

Until the underlying incentives are reconciled, reforms to the petition process can go a long way toward returning, to the agencies appointed by Congress to administer the Act, the decision about which species most urgently require the

²⁰ See *Wildlife at Risk Face Long Line at U.S. Agency*, *supra* n. 14.

²¹ See Jonathan Wood, *Worried About Cuts to the ESA Listing Budget?*, PERC.org (Feb. 20, 2018), available at <https://www.perc.org/2018/02/20/worried-cuts-esa-listing-budget/>.

²² See Congressional Research Service, *The Prescription Drug User Fee Act: Background and Issues for PDUFA IV Reauthorization* (2007), available at <http://congressionalresearch.com/RL33914/document.php>.

²³ See GAO, *Effect of User Fees on Drug Approval Times, Withdrawals, and Other Agency Activities* (2002), available at <https://www.gao.gov/new.items/d02958.pdf>.

²⁴ See *Worried About Cuts to the ESA Listing Budget?*, *supra* n.20.

government's limited resources. An administrative reform by the Obama administration shows how this can be done.

Codifying a temporary peace in the listing-backlog wars

When the absurdity of the most recent backlog became too much to bear, the Obama administration brokered a temporary peace. In 2011, the Department of the Interior agreed to a settlement that established a six-year workplan to review the then-pending megapetitions, in exchange for environmental groups submitting fewer such petitions.²⁵ For the most part, environmental groups cooperated, giving the new plan time to work.²⁶

As the initial 6-year workplan neared its conclusion, the Obama administration proposed a rule to formalize it.²⁷ Under that rule, the Service would assign petitioned species into one of five bins, giving each a different priority based on the degree of threat the species faces, data quality, and whether state and private recovery efforts are ongoing. This allowed the agency to focus its limited resources on the petitions that most deserved them.

Because the Endangered Species Act sets firm deadlines to respond to listing petitions, this approach has largely relied on goodwill. At any time, someone could challenge the agency's failure to respond to a petition by the statutory deadline. And a court could order the agency to respond promptly, even if the agency had assigned the species a low priority under the workplan.

The PETITION Act would codify the Obama administration's approach, eliminating this litigation risk. Importantly, it would rely on the Service rather than random litigation outcomes to prioritize listing decisions in the face of budget constraints. It explicitly adopts the Obama administration's methodology and allows it to be relied on anytime that the Secretary of the Interior declares a backlog. This methodology allows the government to focus its limited resources on

²⁵ See Juliet Eilperin, *Interior Dept. strikes deal to clear backlog on endangered species listings*, Wash. Post (May 10, 2011), available at https://www.washingtonpost.com/national/interior-strikes-deal-with-conservation-groups-on-endangered-species-listings/2011/05/10/AF7iX2hG_story.html?noredirect=on&utm_term=.158a4003b88a.

²⁶ But see Allison Winter, *Petitions for new species protection wobble balance in FWS settlement, agency says*, E&E News (Aug. 7, 2012), available at <https://www.eenews.net/greenwire/2012/08/07/stories/1059968495>.

²⁷ Fish and Wildlife Serv., *Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act*, 81 Fed. Reg. 49,248 (July 27, 2016).

those petitions that are most likely to result in species protection, rather than allowing those resources to be sapped by weaker petitions without such potential. The bill would also require transparency about implementation, both for the benefit of petitioners and the public. As the bill codifies an administrative reform developed by the Obama administration, it should enjoy broad support. Environmentalists and industry have experience working under this approach, and the early results have been positive.

The bill could be further improved by allowing the Secretary of Interior to adjust which bin a species is assigned to based on updated information. For instance, one of the bins is reserved for species that the Service expects to receive new information on, revealing important data about its status. Once the anticipated study is released, it may be sensible for the species to be reassigned to a higher or lower priority bin, based on the results.²⁸

It would also be useful to clarify what Congress expects to happen after the Service declines a petition under the PETITION Act's mandatory deadlines.²⁹ If such denials serve as a signal to the petitioner that she should provide more and better information when resubmitting, so that a subsequent petition is assigned a higher priority, this would be extremely useful. But if the Service could treat the petition denial as a judgment on the merits binding future petitions, that would be concerning—especially as the bill precludes judicial review of automatic denials based on the bill's deadlines.

Moreover, the Committee should be more concerned generally about the dangers of barring judicial review. Undoubtedly, too many Endangered Species Act issues result in litigation. But the solution is to address the underlying incentives that drive that problem, not to ban all litigation, including litigation that advances the public interest.³⁰ In time, you may be surprised by the novel means agencies

²⁸ *But see* PETITION Act, § 4(a)(I)(ii)

²⁹ *See, e.g., id.* § 4(a)(H)(ii)(IV).

³⁰ PLF regularly litigates Endangered Species Act issues on behalf of individuals and organizations whose interests are harmed by overreaching and counterproductive regulations. We have received minimal attorney's fees for this work in recent years. PLF also notes that the cases in which it has received such fees are those in which the government has ignored its own scientists' recommendation that a species' status be changed. The LIST Act would address this problem, rendering future litigation on this issue unnecessary and eliminating this minimal source of attorney's fees.

devise to abuse these provisions and thwart Congress' will.³¹ Therefore, you should be extremely cautious about enacting any limitation on judicial review.

Recognizing when species have recovered

There have been depressingly few delistings under the Endangered Species Act. Although this is primarily due to the lack of incentive for property owners to recover species, it is also due to agencies' stubborn unwillingness to pursue delisting with the same zeal as they pursue listing. Although the law imposes the same standard on delisting decisions as applies to listing decisions, the agencies have imposed far higher burdens on the former in practice.³²

Getting a species removed from the list is a daunting task, even where there is no question that the decision is merited. In case after case where the U.S. Fish and Wildlife Service's own scientists have determined that a species' status should be changed, the agency has ignored them. Property owners can only obtain relief in such circumstances by filing several petitions and lawsuits, an ordeal which may be too expensive or intimidating for the average landowner to undertake.

For instance, the Service's scientists determined that the Valley Elderberry Longhorn Beetle should be delisted in 2006. It ignored this science for 4 years, causing PLF to file a delisting petition on behalf of an affected property owner. Despite this plea from a property owner and the agreement of its own scientists, the Service . . . did nothing. The property owner had to sue not once but twice before the Service finally proposed delisting the insect in 2012.³³ However, in 2014, it withdrew its proposal claiming the studies had become too stale—which of course was due to the agency's dilatoriness.

³¹ In fact, agencies have long used judicial-review bans to thwart Congress' will. For instance, agencies flagrantly ignored the Regulatory Flexibility Act until Congress amended it by repealing its anti-judicial review provision. See 142 Cong. Rec. H3016 (Mar. 28, 1996) (statement of Rep. Ewing); 142 Cong. Rec. H3005 (Mar. 28, 1996) (statement of Rep. McIntosh). Today, agencies hide behind an ambiguous judicial review provision to avoid compliance with the Congressional Review Act. See *Kansas Natural Resource Coalition v. Dept. of Interior*, No. 18-cv-01114 (D. Ks. filed Apr. 10, 2018) (government has moved to dismiss a case seeking the submission of a rule under the CRA based on a theory that would utterly defeat the law's purpose).

³² See 83 Fed. Reg. 35,193, 35,196 (July 25, 2018) (acknowledging this problem and proposing to clarify that the Endangered Species Act requires the same standard be used in both instances).

³³ See Damien M. Schiff, *Service proposes to delist Valley elderberry longhorn beetle*, PacificLegal.org (Oct. 1, 2012), available at <https://pacificlegal.org/service-proposes-to-delist-valley-elderberry-longhorn-beetle/>.

Similar frustrations were felt by property owners affected by the listing of the manatee, although that story at least has a happy ending. In 2007, the Service's scientists determined that the manatee had recovered to the point that its status should be upgraded from endangered to threatened. The agency again ignored its scientists for a prolonged time, prompting PLF to file a petition on behalf of affected property owners. When that petition was ignored too, PLF filed a lawsuit to force a response in 2012. In response to that suit, the Service determined that the species' status should be changed but again did not follow through. So PLF had to sue again. The Service finally reclassified the manatee in 2017, a decade after the science showed this move was warranted.³⁴

Even the bald eagle, the species most cited as evidence of the law's success, fell victim to this bureaucratic morass. When the Service determined the eagle should be delisted, President Clinton held a press conference to share the news. That was 1999. But no such delisting was forthcoming. In 2005, PLF sued on behalf of an affected landowner, urging the Service to follow through. Instead, it fought to have the case dismissed. Only after the courts rejected this gambit did the Service belatedly delist the species in 2007.

Property owners should not have to sue, sue, and sue again to force the Service to do what it has admitted all along should be done. If the government behaved this way with listing decisions, it would be a national scandal. Imagine if the Service determined a species was critically endangered then ignored that determination, even in the face of petitions and lawsuits, which it fought rather than doing the right thing.

The LIST Act would fix this imbalance by directing the Service to initiate the delisting process once its scientists conclude that a species has recovered or otherwise merits delisting. That is a sensible change. There is no reason why species should linger on the list long after the science shows delisting is warranted.

The LIST Act also addresses another serious problem: the large number of species that have been improperly listed based on bad data. The Service acknowledges 19 such mistakes. But a recent Heritage Foundation report shows that the actual number is far higher.³⁵ The data reveal that approximately half of

³⁴ See Pam Wright, *Florida Manatee Status Changed to 'Threatened' As Congress Targets Endangered Species Act*, weather.com (Mar. 31, 2017), available at <https://weather.com/science/nature/news/florida-manatee-endangered-species-regulations>.

³⁵ Robert Gordon, *Correcting Falsely "Recovered" and Wrongly Listed Species and Increasing Accountability and Transparency in the Endangered Species Program*, Heritage Found.

all domestic species reported as “recovered” under the Endangered Species Act were not endangered in the first place but, instead, listed based on bad data which were subsequently corrected. If these delistings were properly categorized, the number of species delisted for data error would dwarf the few recoveries.

For instance, the Service listed the Hoover’s wooly star in 1989, speculating that there were as “few” as 35,000 to 300,000 of the plants.³⁶ A full survey was only performed after the species was listed. According to the Service, the actual population size is approximately 135,000,000.³⁷ Yet, despite this several-orders-of-magnitude error, the Service considered the delisting as a recovery. It credited the listing as the impetus for the survey and then attributed the findings to the listing, even though the survey didn’t increase the size of the population but only revealed the error on which the listing was originally based.³⁸

Species lingering on the lists dissipate resources from those species who need them. In the case of false-recoveries, for instance, the Service incurs years of post-listing monitoring. Given the limited funding for recovery efforts, such misallocations are unacceptable.³⁹

The LIST Act’s solution to this problem could benefit from further clarification, however. The bill wisely directs the Service to act promptly when it determines that a species’ listing depends on a data error. However, it also authorizes the Secretary of the Interior to declare that a petitioner knew a petition contained inaccurate, fraudulent, or misrepresentative information and to deprive such a person of the right to submit petitions for 10 years. It’s not clear whether the aggrieved petitioner would have a right to judicial review of this determination, although she should before being denied such an important right. As discussed above, statutory bans on judicial review can be dangerous licenses for agencies to thwart Congress’ true aims.

This broad grant of power to the Secretary raises the potential for mischief, which should concern both sides of this issue. The Secretary might abuse this power

Backgrounder (Apr. 16, 2018), available at https://www.heritage.org/sites/default/files/2018-04/BG3300_0.pdf.

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ Ecologists have long observed that scarce conservation funds are routinely misallocated. Most notably, they are doled out to charismatic species at far greater rates than less popular species. See Leah R. Gerber, *Conservation triage or injurious neglect in endangered species recovery*, PNAS (Mar. 29, 2016), available at <http://www.pnas.org/content/113/13/3563>.

against environmental groups or industry petitioners, depending on the bureaucrats' political views. Here, as is often the case, it's best not to confer power to an Executive Branch official without first considering whether you'd want your fiercest opponent to wield it. Thankfully, concerns about petitioner foul-play could be addressed with less drastic means by, for instance, allowing the Service to consider a group's past petitions in assessing the credibility of data presented in a subsequent petition. If a group has a history of malfeasance, that should be taken into consideration. But it may not always be dispositive.

Finally, and somewhat repetitively, Congress should clarify the circumstances in which it intends to forbid judicial review—and should minimize such circumstances. The LIST Act provides that a “negative” finding, but not a “positive” one, under § 2(b)(H)(i) is subject to judicial review. It's not clear from the text whether this means judicial review is only available when the Service delists a species citing data error or instead only when it maintains the status quo. But, that ambiguity aside, judicial review should be available in either circumstance to ensure that the agency follows Congress' intent under the bill.

Conclusion

We need not tolerate the broken procedures I've described in my testimony. They benefit neither people nor endangered species, but instead harm both. Codifying the Obama administration's backlog workplan is a sensible way to convert this temporary peace into a long-term improvement. Similarly, facilitating more delistings is an effective way to ensure that limited conservation resources go to the species that need it. It also reduces the need for litigation brought by property owners to force the agencies to listen to their own scientists, which unnecessarily taxes both the property owners and the agencies.