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OVERVIEW OF HOUSE EXPANDED EXTINCTION PACKAGE

The House Expanded Extinction package is comprised of the nine bills listed below unveiled by the Western Caucus on July 12th that join more than 100 other bills, amendments and riders introduced in this Congress as well as a damaging package of regulatory changes put forward by the Trump Administration that would undermine the Endangered Species Act (ESA). This package includes bills that would: result in increased harm to protected species and their habitat, create barriers to listing species and interfere with the science-based listing process under the ESA, delegate management of listed species to the states, allow state veto authority over decisions to list species, allow the use of faulty science, undermine citizens' ability to enforce the ESA in court, and carve out exceptions for critical habitat designation.

The ESA is America's most effective law for protecting wildlife in danger of extinction. It is effective largely because it is a science-based law. Ninety-nine percent of listed species have survived and many more have been set on a path to recovery, including the iconic American Bald Eagle, the Grizzly Bear and the Florida Manatee. At a time when extinction rates are over 100 times higher than normal, we should be working to strengthen, not weaken, the nation's best tool for helping to stave off the tragedy of extinction. The ESA also is broadly popular with the American people. A recent study by researchers at the Ohio State University found that roughly four out of five Americans support the ESA.

I. H.R. 3608: The Endangered Species Transparency and Reasonableness Act of 2018

The Endangered Species Transparency and Reasonableness Act, H.R. 3608, would diminish and discourage public participation, including from scientific experts, in ESA proceedings. This bill declares that all data submitted by a state, tribal or county government is the "best scientific and commercial data available," even if that is in fact not the case. Allowing listing decisions and critical habitat designations to be made on the basis of inferior science significantly increases the likelihood that imperiled species would be erroneously denied critical protections.

II. H.R. 6344: Land Ownership Collaboration Accelerates Life Act of 2018

H.R. 6344, the Land Ownership Collaboration Accelerates Life Act ("LOCAL Act"), would in part create a loophole to the ESA's prohibition on take of endangered species that could have severe and irreparably damaging impacts on species faced with extinction. The LOCAL Act would add provisions under Section 10(l) of the ESA providing that in the event an individual requested

a determination from the Secretary whether a particular activity would constitute unlawful take, that such activity would automatically be considered to not be a take if the Secretary fails to respond to such a request within 180 days. This provision is alarming because, at times, the Secretary will probably lack the resources necessary to provide a timely response. This new provision could create an incentive for individuals to inundate the Secretary with requests in the hopes of obtaining authority to take endangered or threatened species outside of the normal permitting process. Moreover, under the LOCAL Act, if a no take determination is automatically granted due to a missed deadline, this authorization would remain effective for five years. Finally, the bill states that the Secretary may only withdraw such a determination in the case of certain unforeseen changed circumstances.

The LOCAL Act would also divert scarce agency resources by establishing a system wherein conservation grants and aid will be awarded to landowners who receive written notification that their activities would constitute a violation of the ESA's take prohibition. The Fifth Amendment already provides individuals with just compensation when their property is taken by government action but requires substantially complete loss of the use of their property. Landowners have no Constitutional entitlement to having completely unrestricted use of their land. The LOCAL Act, therefore, would expend taxpayer dollars to play favorites with certain individuals simply to ensure that they comply with the ESA. This substantial cost would cripple enforcement of the Act.

III. H.R. 6345: Ensuring Meaningful Petition Outreach While Enhancing Rights of States Act of 2018

In general, the Ensuring Meaningful Petition Outreach While Enhancing Rights of States Act ("EMPOWERS Act"), H.R. 6345, threatens the agency's ability to make listing decisions based solely on scientific and commercial data and gives states de facto veto authority over listing decisions. In part, this bill would require the Secretary to solicit information about the anticipated effects of listing decisions from counties and states. Under current laws, the Secretary is already required to consult with the appropriate affected states, and counties may provide insight as well. However, there is currently no requirement for the agency to specifically seek out information about anticipated effects. Because the ESA requires listing decisions be made based on the best scientific and commercial data available, requiring discussion to include information about anticipated effects—such as economic impacts—may influence the Secretary to make politically-motivated listing decisions.

Moreover, if a state or county with whom the Secretary has consulted objects to a proposed listing or critical habitat determination, this bill would forbid the Secretary from proceeding with the action unless the Secretary demonstrates that information submitted by the locality is incorrect and that the action is warranted. This requirement would put the burden on the Secretary to disprove evidence submitted by the state or county and would otherwise preclude listing even if the overwhelming weight of other evidence in the record supports listing.

IV. H.R. 6346: Weigh Habitats Offsetting Locational Effects Act of 2018

H.R. 6364, the "WHOLE Act," would increase the likelihood that a federal agency action would jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. The Section 7 consultation process is designed to prevent this outcome in part by reviewing the negative effects of a federal agency action and considering any offsetting measures, such as avoidance, minimization, or mitigation. The WHOLE Act, however, would insert a new provision into Section 7 that would allow the Secretary to consider nonbinding offsetting measures. Such a provision would allow an agency to fail to implement specific offsetting measures that may have served as the basis of a "no jeopardy" determination. The bill, therefore, enhances the risk that improper or no offsetting measures are in place once a federal agency action commences, resulting in jeopardy.

V. H.R. 6354: Stop Takings on Reserves Antithetical to Germane Encapsulation Act of 2018

H.R. 6354, the STORAGE Act, may prevent the designation of a sufficient amount of critical habitat necessary for a species to survive. This is because the bill would prohibit the Secretary from designating as critical habitat any area in water storage, diversion, or delivery facilities where habitat is periodically created and destroyed due to changing water levels resulting from the operation of these facilities.

VI. H.R. 6355: Providing ESA Timing Improvements that Increase Opportunities for Nonlisting Act of 2018

H.R. 6355, the Providing ESA Timing Improvements that Increase Opportunities for Nonlisting Act (PETITION Act) would create additional barriers to listing species and automatically trigger denials of petitions to list or uplist species in the event of a backlog of listing petitions. The PETITION Act requires the Secretary to automatically declare "petition backlogs" if the number of petitions with missed 90-day or 12-month findings exceeds 5% of the number of species for which 90-day or 12-month petitions have been presented over the last 15 years. Once a backlog for 90-day or 12-month petitions has been declared, under most circumstances, the Secretary must prioritize petitions to delist or downlist species above petitions to list or uplist species. The bill further would automatically deny most petitions to list or uplist a species during a 90-day or 12-month petition backlog. This bill would deny ESA protection for imperiled species due to resource constraints that prevent the Secretary from meeting statutory petition deadlines in a timely fashion. Notably, there is no similar automatic negative finding provision for petitions to delist or downlist species. Moreover, automatic negative petition findings would be exempt from judicial review. There is no similar provision barring judicial review when the Secretary makes a negative finding on any backlog petition to delist or downlist a species. Finally, this bill prevents members of the public from using litigation to ensure the Secretary makes timely findings on 90-day and 12-month petitions to list or uplist species during a petition backlog, but it does not prohibit the use of litigation to force the removal or downlisting of species during a petition backlog.

VII. H.R. 6356: Less Imprecision in Species Treatment Act of 2018

The Less Imprecision in Species Treatment Act of 2018 ("LIST Act") increases the risk of incorrectly delisting imperiled species while simultaneously deterring the public from petitioning to list other species that are imperiled. This bill in part states that if the Secretary decides to delist a species because he has determined that it was listed in error, this delisting decision would not be judicially reviewable. Forbidding judicial review eliminates a vital check on delisting decisions that may not have been made on the basis of the best scientific and commercial data available. In contrast, this bill would allow judicial review of agency decisions finding that a species was not erroneously listed. Thus, these judicial review provisions stack the odds in favor of wrongly removing protections for threatened and endangered species. The LIST Act would also prevent a party from submitting a listing petition for 10 years if they "knowingly" included inaccurate, fraudulent, or misrepresentative information in a listing petition. The bill is unclear about how an inquiry into whether a party "knowingly" submitted such information would be initiated and how invasive this inquiry may be. However, such an inquiry may deter parties from submitting listing petitions that contain legitimate information out of fear that it might result into a politically-driven inquiry into their actions to conserve listed species.

The ESA currently requires that the same process and criteria be used to both list and delist a species by making a determination on the basis of the best scientific and commercial data available when considering the five listing factors under section 4(a)(1). However, this bill would require the Secretary to delist a species when he has developed or received "substantial information" that a species has recovered or the recovery goals for a species have been met. This change would subvert the integrity of the ESA because the delisting process would no longer require a methodical review of the listing factors to ensure that a listed species is not threatened or endangered, elevating the importance of recovery goals above an actual listing determination.

VIII. H.R. 6360: Permit Reassurances Enabling Direct Improvements for Conservation, Tenants, and Species Act of 2018

The Permit Reassurances Enabling Direct Improvements for Conservation, Tenants, and Species Act, otherwise known as the "PREDICTS Act" would weaken many existing regulations governing cooperative conservation efforts between the agency and landowners. Agency regulations currently allow landowners to voluntarily enter into (1) Candidate Conservation Agreements with Assurances, which address conservation measures for species that are anticipated to be listed and (2) Safe Harbor Agreements, which address conservation measures for listed species. These agreements currently benefit landowners in part because they will be granted take permits and will receive assurances that under many conditions, such if a species were to be listed, or if circumstances involving a species may change, landowners would not be required to undertake any additional or different conservation activities. The PREDICTS Act would continue to allow these landowners to receive such benefits. However, the bill also weakens the requirements that landowners must adhere to under current regulations, such as by making it

more difficult for an agreement to be terminated if a landowner fails to meet his responsibilities and by allowing landowners to provide fewer conservation benefits.

IX. H.R. 6364: Localizing Authority of Management Plans Act of 2018

H.R. 6364, the Localizing Authority of Management Plans Act ("LAMP Act") would significantly impair the ability of federal agency experts to conserve listed species. Section 6(c)(1) of the existing ESA allows states and the federal government to enter into cooperative agreements, wherein states propose programs to conserve listed species and the Secretary assists with management of these programs. 16 U.S.C. § 1535(c)(1). The LAMP Act, however, seeks to amend this provision to allow management to be delegated to the states with little to no federal oversight. Moreover, currently under Section 6(e) of the ESA, the Secretary is required to review state programs on an annual basis. 16 U.S.C. § 1535(e). Furthermore, the current ESA states that any state law or regulation regarding the take of a listed species may be more restrictive than what federal law requires but cannot be less restrictive than current law. The LAMP Act, however, provides that state law may be more restrictive, but has removed the portion of the existing ESA that prevents states from enacting laws that are less restrictive than federal laws. Thus, this bill would effectively sanction the replacement of federal endangered species protections with less protective state laws and regulations.

Furthermore, the LAMP Act would also allow non-federal parties to manage species on certain public and private lands while being exempted from the ESA's consultation requirement and take prohibition. The ESA currently allows the Secretary to enter into "management agreements" with any state, which would allow the state to manage areas established for the conservation of a listed species. The LAMP Act, however, would allow the Secretary to enter into "cooperative management agreements" with any units of government or non-Federal person. In addition to expanding the scope of who may enter into such an agreement, the LAMP Act would also allow parties to a cooperative management agreement to manage both species and land, as opposed to the current ESA's provisions that states may only manage land. Moreover, the LAMP Act would exempt parties to an agreement from sections 5, 7, and 9 of the ESA, allowing them to forgo consultation on federal actions and exempting them from the ESA's take prohibition. Broadening this scope would vastly increase the authority of states and non-federal parties, such as oil and gas companies, to apply for authority to manage species. Such entrants may have subversive motives or insufficient knowledge, advancing imperiled species even further toward extinction. Finally, the LAMP Act would exempt entry into cooperative management agreements from review under the National Environmental Policy Act, allowing the Secretary to approve such agreements without consideration of environmental impacts or public comment.

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