AMERICAN STEWARDS of Liberty

RECOMMENDED AMENDMENTS TO THE "ESA AMENDMENT ACT OF 2025"

Failure of the ESA:

The Endangered Species Act (ESA) has become the environmentalist's greatest weapon to control private and federal land activities far beyond Congressional intent.

As of 2023, over 1667 species have been listed as threatened or endangered over the 50 year period of the Act. Proponents claim they have "recovered" 62 species. However, 36 of these are not true recoveries — they were species erroneously listed largely due to data errors.

The ESA Amendment Act of 2025 (HR 1897) will minimize the impact of the Act on businesses and landowners. We recommend adding key provisions that will also address the listing process directly, ensuring only species truly warranting concern are federally protected.

Proposed Amendment Language Summary:

1. Removes "distinct population segments" from "species" definition.

2. Removes listings made under the original "species" definition.

3. Removes "throughout all or a significant portion of its range" dramatically reducing what can be designated as "critical habitat."

4. Clarifies scope of "critical habitat" and limits application on State and private lands.

5. Requires Congressional review of critical habitat designations over 100,000 acres.

6. Defines key terms significantly limiting actions that trigger Section 7 consultations.

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RECOMMENDED ENDANGERED SPECIES ACT AMENDMENTS

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Since its enactment in 1973, the Endangered Species Act (ESA), 16 U.S.C. 1531–1544, has evolved into one of the nation's most demanding environmental laws. The ESA's goal is the recovery of species, at which point the protections afforded by the Act are no longer required. Unfortunately, the ESA's recovery goal often takes a back seat to another goal—land use regulation. This evolution has taken place incrementally over the past 35 years through a combination of judicial decisions redefining key provisions of the ESA and policy changes at the agency level, which have altered the way the ESA applies to land and resource uses while encouraging lawsuits by environmental groups.

These problems can be addressed in a durable fashion by amending the ESA. But that is much easier said than done. The ESA is considered sacrosanct by environmental groups and their supporters, who are well-funded and wield considerable power. Many members of Congress, especially members from states in the Northeast, California, and the Pacific Northwest, are reluctant to expose themselves to the attacks that amending the ESA are likely to bring. For this reason, no major amendments to the ESA have been enacted since the 1980s.

By avoiding major structural changes to the statute, it may be easier to have meaningful changes enacted for the first time in nearly 40 years. The following discussion identifies relatively simple changes to the ESA that address serious problems and narrow the law's scope without requiring dramatic changes.

1. Listing Species.

The cornerstone of the ESA is the process by which species are listed as threatened or endangered and is governed by Section 4 of the ESA, 16 U.S.C. § 1533. Listing triggers the ESA's other requirements, including the designation of critical habitat, the application of Section 7's substantive and procedural requirements, and the Section 9 "take" prohibition. Over the past several decades, the standards for listing have been relaxed, allowing fish and wildlife below the species level to be protected. The ability to divide species into smaller groups for listing purposes makes listing easier and causes more land and resource conflicts. The following changes would help to limit the listing of groups of fish and wildlife below the species level.

- **Halt the listing of "distinct population segments" of fish and wildlife**. Currently, the definition of "species" includes species, subspecies, and "*any distinct population segment of any vertebrate fish or wildlife which interbreeds when mature*." 16 U.S.C. § 1532(16). Congress has cautioned that it expects the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) to use their authority to list distinct population segments (DPS) "sparingly." S. Rep. 96-151, at 6-7 (1979). Unfortunately, the listing of groups of fish and wildlife as DPS has become a common practice. It allows groups of fish and wildlife to be protected rather than biological species.

  For example, the North American wolverine DPS was listed in 2023 as a threatened species in the continental U.S., even though wolverines are common in western Canada and Alaska and face few threats. This DPS was listed on the basis that the Canadian border creates a "distinct" population, even though wolverines in the northwestern U.S. and southwestern Canada are the same species. The Canada lynx DPS is another

species that is listed as a threatened species in the continental U.S. but is common in Canada and Alaska. Its listing was also based on the Canadian border, allowing lynx found in the continental U.S. to be treated as a biological species for listing purposes. Without the ability to create DPS, neither species would be eligible to be listed.

The remedy for this problem is twofold: (1) amend the definition of "species" in ESA Section 3 to remove the phrase "any distinct population segment of any vertebrate fish or wildlife which interbreeds when mature"; and (2) direct the Secretaries of the Interior (FWS) and Commerce (NMFS) to promptly remove all species from the lists of threatened or endangered species that are listed as a DPS. This change would not preclude the relisting of these groups as a species or subspecies, if they qualify. But groups of fish and wildlife below the subspecies level could not be listed as DPS.

- **Delist species that were listed based on original "species" definition**. Congress, in 1978, amended the definition of "species" to include the phrase "any distinct population segment of any vertebrate fish or wildlife which interbreeds when mature," discussed above. Previously, the definition of "species" included species, subspecies, and "any other group of fish and wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." This fuzzy definition allowed groups of fish and wildlife to be listed even though the species or subspecies was widespread and faced few threats in many areas. Examples include the gray wolf and grizzly bear, which were listed in the continental U.S. in the 1970s despite being common in Canada and Alaska.

  The remedy this problem, the ESA does not require amendment. Instead, Congress should enact a provision that requires the Secretaries of the Interior (FWS) and Commerce (NMFS) to promptly review and remove all species from the lists of threatened or endangered species that are currently listed under the old and superseded "species" definition as a "group of fish and wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature." Again, this change would not preclude the relisting of species as a species or subspecies, if they qualify.

- **Remove the phrase "throughout all or a significant portion of its range" from the definitions of "endangered species" and "threatened species."** The ESA defines "endangered species" as a species "which is in danger of extinction *throughout all or a significant portion of its range*." 16 U.S.C. § 1532(6). The ESA similarly defines "threatened species" as a species "which is likely to become an endangered species in the foreseeable future *throughout all or a significant portion of its range*." 16 U.S.C. § 1532(20). Courts have declared that the meaning of the phrase "throughout all or a significant portion of its range" is ambiguous. This uncertainty has been used to list species even when the species as a whole is not in danger of extinction or likely to become endangered in the future.

  Previously, the Services interpreted this phrase to mean that a species will be considered endangered if it is threatened with extinction throughout all of its range or within enough of the species' range that the species' continued existence is at risk. The focus was on the biological status of the *entire* species rather that its status in particular areas. But the Ninth Circuit issued a decision in 2001 rejecting that common-sense interpretation, holding that the Services' interpretation failed to give "independent meaning" to the phrase. *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1141-42 (9th Cir. 2001). Since then, the Services have struggled to define the phrase, and

environmental groups have challenged listing determinations on the ground that the species' status in specific areas was not properly evaluated, effectively treating "ranges" as separate species.

To remedy this confusion and allow the definitions of "endangered species" and "threatened species" to be properly (and narrowly) interpreted and applied, the definitions should be amended to remove the phrase "throughout all or a significant portion of its range." Thus, the definition of "endangered species" would become "*a species which is in danger of extinction*" and the definition of "threatened species" would become "*a species which is likely to become an endangered species in the foreseeable future*." These changes would ensure that the species' overall biological status is the focus of listing decisions rather than its status in particular areas.

In addition, language should be added to each definition stating: "The Secretary shall evaluate the biological status of the entire species or subspecies and shall list the species or subspecies only when the entire species unit meets the definition of an endangered species" [or a threatened species]. These changes would prevent future confusion by clearly expressing Congress' intent to focus on the status of the entire species, not on smaller groups of fish and wildlife.

2. Critical Habitat.

The ESA provides that a species' critical habitat must be designated at the time a species is listed "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A). Critical habitat has a two-part definition. First, in areas occupied by the species, critical habitat is defined as areas that contain "physical and biological features" that are "essential to the conservation of the species" and "require special management considerations or protection." 16 U.S.C. §1532(5)(A)(i). Second, in unoccupied areas, critical habitat is defined as "specific areas" that "are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

Once designated, critical habitat restricts land and resource uses through the application of ESA Section 7(a)(2), 16 U.S.C., § 1536(a)(2), which prohibits federal actions that are likely to destroy or adversely modify critical habitat. Court decisions have altered the regulatory impact of critical habitat by improperly treating critical habitat as habitat needed for the recovery of species, rather than habitat that is essential for the species continued existence, i.e., its survival. *See*, *e.g.*, S. Rep. No. 95-874, at 10 (1978) ("There seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species' continued survival.").

As a result of court decisions and overzealous agency employees, critical habitat designations have grown dramatically in size and frequently include millions of acres. For example, FWS designated approximately 119 million acres as critical habitat for the polar bear. More recently, NMFS designated two areas, each over 160 million acres, for the bearded seal and the ringed seal. By contrast, the State of Texas contains 172 million acres. Those critical habitat designations were in Alaska, where everything seems to be bigger. But even in the continental U.S., designations exceeding 10 million acres are common. For example, the critical habitat of the Canada lynx DPS, with changes proposed in November 2024, exceeds 23 million acres. Remarkably, these critical habitat areas were considered to be occupied by the species.

The following changes to the ESA would ensure that critical habitat is limited to areas that are truly essential to the species' continued existence, as Congress intended.

- **Amend the definition of the term "critical habitat."** To clarify and limit the scope of the definition of critical habitat in Section 3(5) of the ESA, add the following subsections to the definition:

> (D) The term "essential to the conservation of the species," as used in the definition of the term "critical habitat," means that the area's physical and biological features are or, in the case of an unoccupied area, the area itself is, indispensable to the species' continued survival and not merely beneficial or helpful to its survival or its recovery.
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> (E) Critical habitat shall include only those areas that contain habitat for the species when critical habitat is designated, including the physical and biological features necessary for its survival. Areas that may develop suitable habitat features in the future but are not currently capable of serving as habitat shall not be designated as critical habitat.
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> (F) Critical habitat will normally be limited to areas under Federal ownership or control and shall not include State and private lands unless such lands are first determined to be essential for the species' continued survival. Any non-Federal lands being considered for designation as critical habitat must be evaluated for exclusion under subsection 1533(b)(2) of this title.

These changes are based largely on the Supreme Court's decision in *Weyerhaeuser v. FWS,* 589 U.S. 9 (2018), and a subsequent Ninth Circuit decision, *Center for Biological Diversity v. FWS*, 67 F.4th 1027 (2023), holding that areas designated as critical habitat must be habitat, i.e., capable of supporting the species, and that the area must be "indispensable" or "necessary" to the conservation of the species, not merely helpful or beneficial to the species.

New subsection (F) is intended to ensure that non-federal land will be designated only when it is essential for the species' survival and to ensure that the Service conducts an exclusion evaluation under Section 4(b)(2) before such land is designated.

- **Congressional review of critical habitat designations**. To limit critical habitat designations to a reasonable size, ESA Section 4(a)(3), 16 U.S.C. § 1533(a)(3), should be amended to add a subsection that requires the Secretary to provide notice to Congress if the agency is proposing to designate as critical habitat an area greater than 100,000 acres. (A smaller area could be used, but to avoid controversy, the size should be reasonably large.) This provision could be modeled after the Congressional approval process that applies to sales of public land tracts that exceed 2,500 acres. *See* 43 U.S.C. § 1713(c); *see also id.* § 1714(c) (Congressional approval process for land withdrawals aggregating 5,000 acres of more. The Service would be required to identify the area and its existing and future land and resource uses, and to explain why the area is indispensable for the species' continued survival. The Service should also be required to explain why the area's existing management is inadequate to protect the species and, if applicable, why non-federal land is being designated. Congress could then decide whether to adopt a resolution allowing the designation. Such a process is logical given that the Property Clause of the Constitution gives Congress the power to manage federal lands.

3. Section 7 and the "Jeopardy" and "Adverse Modification" Standards.

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), requires each federal agency, "in consultation with and with the assistance of" the Services, to ensure that "any action authorized, funded or carried out" by that agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat" designated as critical. Thus, federal actions may not proceed if they would either jeopardize the continued existence of a listed species or destroy or adversely modify a listed species' critical habitat.

The prohibition imposed by Section 7 is limited to actions in which there is discretionary federal involvement or control. *See* 50 C.F.R. § 402.03. As other federal regulatory programs have expanded, however, an increasing number of non-federal activities require some sort of federal permit or approval or have some other federal nexus that triggers Section 7. At the same time, the Services have become increasingly aggressive in exploiting the Section 7 consultation process to control how land and water resources are used.

Many of the problems with Section 7 arise from confusion over the causal relationship required for an impact to be considered an "effect" of a federal action and from the failure to clearly delineate the scope of federal authority, especially where the federal action consists of a permit, license, or similar approval needed for a private project, such as permits issued under the Clean Water Act. Often, private land uses are effectively "federalized" and improperly treated as products of the federal permit using a simplistic "but for" causation test—"but for" the federal permit, your private project could not proceed; thus, all of the impacts of your private project are an effect of the federal permit, regardless of the permitting agency's jurisdiction.

Another serious problem concerns court decisions indicating that the standard used in determining whether a proposed action violates Section 7 should be based on impairment of a species' future recovery rather than jeopardizing the species' continued existence, i.e., its survival.

The problems summarized above can be addressed through amendments to Section 3 of the ESA, 16 U.S.C. § 1533, to define key terms used in Section 7. At present, these terms are ***not*** defined by the statute. Instead, they are defined in the Services' regulations and are subject to change and reinterpretation by the courts.

- **Define "jeopardize the continued existence of."** The purpose of adding this definition is to clarify that "jeopardize the continued existence of" refers to actions that threaten the species' survival, i.e., its continued existence. As stated, some courts (most notably the Ninth Circuit Court of Appeals) have suggested that this standard is violated if the action interferes with a species' recovery.

  > The term "jeopardize the continued existence of" as used in section 1536 of this title means to engage in an action that significantly reduces the likelihood of a listed species' continued survival in the wild by reducing the reproduction, numbers, or distribution of that species to the point that it faces extinction. Adverse impacts that may impair a species' recovery do not jeopardize the species' continued existence.

- **Define "destruction or adverse modification."** The purpose of adding this definition is to clarify that "destruction or adverse modification" of critical habitat does not include

impacts to critical habitat that may impair recovery. The purpose of critical habitat is to support the species' survival. Critical habitat is not "recovery" habitat.

> The term "destruction or adverse modification" as used in section 1536 of this title means to engage in an action that alters the critical habitat of a listed species to the point that the critical habitat is unable to support the survival of that species. The destruction of a portion or segment of a species' critical habitat does not constitute destruction or adverse modification unless that loss significantly diminishes the capability of the remaining critical habitat to support the species' survival. Adverse impacts to critical habitat that may impair a species' recovery do not constitute destruction or adverse modification.

· **Define "action" and "agency action."**

This definition is intended to address the problem discussed above concerning the use of federal permits and other authorizations to "federalize" non-federal projects. The requirements of Section 7 apply only to the activities and programs of federal agencies, not to the activities of private landowners.

> The terms "action" and "agency action" as used in section 1536 of this title mean an activity or program that is authorized, funded, or carried out by a Federal agency in the United States or upon the high seas. For an effect on a listed species or its critical habitat to be considered an effect of such action, the effect must be caused by the action of the Federal agency and not by the actions of non-Federal actors that that are not subject to Federal jurisdiction or control. In addition, the effect must be reasonably certain to occur, not speculative or uncertain.

Norman D. James, PC: The recommended amendments were drafted by Norman James, who has a long career litigating the Endangered Species Act, which includes wining the Supreme Court decision in Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 664 (2007). https://www.dorsey.com/people/j/james-norm

Species Recovery Data Reference: The Endangered Species Act at 50, by Rob Gordon, published by the Western Caucus Foundation. https://www.westerncaucusfoundation.org/esa-report-2023/

American Stewards of Liberty is a 501(c)(3) non-profit organization whose mission is to protect property rights and the liberties they secure by defending the use of our land, and restoring local control. This issue briefing is provided to educate public and policy makers on federal actions that erode property rights and identify responses that would bring these actions in alignment with full Constitutional protection of these rights.