Opposition to Resolution Rescinding Longfin Smelt ESA Listing (H.J. Res. 78)

Rescinding the ESA listing of the San Francisco Bay-Delta population of Longfin Smelt, as H.J. Res 78 proposes, would not only push this native fish towards extinction and accelerate the collapse of one of the country's greatest treasures (the San Francisco Bay-Delta ecosystem), but it is also an attempt to expand the scope of the CRA in violation of the statute.

A Resolution, H.J. Res. 78, was introduced on March 14, 2025, by Congressman Doug LaMalfa to disapprove, pursuant to the CRA, the FWS's rule published July 30, 2024, listing the San Francisco Bay-Delta distinct population segment (DPS) of the Longfin Smelt as endangered.

Anti-wildlife members in the 119th Congress have launched an all-out assault on the Endangered Species Act (ESA) and the species under its protection. These attacks have come in a variety of forms, from standalone legislation to amendments and riders on must-pass bills, to the disapproval of rules using the Congressional Review Act (CRA). Since the CRA prevents future issuance of a rule that is "substantially the same" as a disapproved rule, its use for ESA related rules, especially nullifying listing or uplisting species, is particularly dangerous.

If and when Congress chooses to use the CRA to disapprove of any rules, it must do so within the explicitly defined criteria that were set out in the text of the CRA. The statute clearly provides a limited timeframe for Congress to disapprove of rules using the CRA's special set of parliamentary procedures. Once those time periods expire, the CRA cannot be used to bypass the filibuster to repeal said rule. Approving a CRA resolution of disapproval for a rule that was finalized outside of that window would flout the plain language of the CRA and expand its reach beyond the original congressional intent.

Longfin Smelt were once among the most abundant native fish in the Bay-Delta estuary. (Image: San Francisco Baykeeper)

What are Longfin Smelt?

Longfin Smelt are a small but important species of fish that inhabits estuaries along the Pacific Coast. Scientists first identified the San Francisco Bay-Delta DPS of Longfin Smelt as a species that warranted endangered species act protection in 1992, more than 30 years ago. Responding to a petition to list the DPS filed in 2007 and to a court order requiring action, the FWS finally listed Bay-Delta Longfin Smelt in July 2024.

Why care about Longfin Smelt? Why is the species so important for the Delta?

The ecological health of the San Francisco Bay-Delta estuary ("Bay-Delta") – the largest inland estuary on the west coast of the Americas and one of our country's great natural treasures – is near collapse, with **seven** species, from critical foodweb species like the Longfin Smelt to commercially and recreationally important species like Chinook Salmon, careening towards extinction. In fact, the Bay-Delta faces numerous threats:

- Looming extinction of native fish populations
- Declining economically and culturally valuable salmon runs
- Increased water temperatures that cause mass fish die offs
- Explosive growth of harmful algae blooms that threaten humans and animals

Providing sufficient river flows into and through the Bay estuary, ensuring adequate temperatures, preserving water quality and other measures is essential for the survival of Longfin Smelt, other native fish, clean water for communities, and productive fisheries.

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Why are Longfin Smelt under attack?

Environmental needs for fresh water have been inaccurately portrayed as conflicting with human needs. Rather than working to protect the Bay-Delta estuary's native fish, clean water, fisheries, and the people that depend on them, some politicians scapegoat endangered species protection, and smelt conservation efforts in particular, as the cause of water shortages for industrial agriculture or even for fighting wildfires.

The truth is that ESA protections do not result in substantial reductions in water deliveries. A published scientific study (Reis, Howard, and Rosenfield 2019) found that federal ESA protections for six federal and state endangered species in effect from 2010-2018 (which were much more stringent than current ESA rules) led to an average 5% increase in Central Valley River flow that reached San Francisco Bay (with Delta Smelt protections accounting for only around 1%). In other words, claims that ESA protections are to blame for substantially reduced water supplies and deadly wildfires are entirely inaccurate.

Why would H.J. Res 78 push Longfin Smelt towards extinction and expand the CRA in unprecedented and harmful ways?

The Congressional Review Act is a scorched-earth, undemocratic, one-size-fits-none instrument with far reaching consequences, particularly for endangered species. The CRA gives Congress the ability to essentially veto any single regulation issued by an agency within 60 legislative days of the regulation's issuance and with a simple majority vote in both chambers. Upon enactment of a CRA resolution, the underlying regulation becomes void and the agency is prevented ever again issuing a rule that is "substantially the same" without an act of Congress. Put simply: a CRA resolution to rescind protections for a species under the Endangered Species Act directly undermines the recovery of that species.

Endangered Species Act protections for Bay-Delta Longfin Smelt can no longer be reversed under the CRA. Under the "lookback" mechanism included in the CRA, rules that are submitted to Congress with fewer than 60 legislative days left in a session must receive a new 60 legislative day period of review starting in the following session of Congress. The rule listing Bay-Delta Longfin Smelt under the Endangered Species Act was issued on July 30, 2024, and officially transmitted to the House on August 9, 2024 and the Senate on August 15, 2024. All three dates fall before the August 16, 2024 date that marks the start of the current lookback period. As a result, Congress cannot use the CRA to overturn these protections in the 119th Congress.

H.J. Res. 78 is the latest attempt to use the CRA in unprecedented and improper ways that would open a "Pandora's box" for future misuse, expansion, and abuse. In order for Congress to use the CRA's special set of parliamentary procedures to undo a rule, that action must meet explicitly defined criteria in the CRA that members of Congress agreed to when they first enacted the CRA. These criteria include: 1) that a targeted agency action must in fact be a "rule" and 2) that the action must be reviewed within the time periods outlined in the CRA. Efforts to repeal certain Clean Air Act waivers (which the Government Accountability Office has officially determined are not rules under the CRA) and rescind the Bay-Delta Longfin Smelt listing (which was finalized and sent to Congress before the start of the current lookback period) directly flaunt these guardrails. Moving the goalposts for what constitutes Congress "receiving" a rule under the CRA, as proponents of H.J. Res. 78 seem to be doing, would violate the statute and create a level of regulatory uncertainty that Congress sought to prevent by including clear timelines for the repeal of rules in the text of the CRA. Congress must adhere to the rules it put into law when it passed the CRA, not bend them to fit political whims.

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