

WEIGH HABITATS OFFSETTING LOCATIONAL EFFECTS
ACT OF 2018

NOVEMBER 27, 2018.—Committed to the Committee of the Whole House on the
State of the Union and ordered to be printed

Mr. BISHOP of Utah, from the Committee on Natural Resources,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 6346]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 6346) to amend the Endangered Species Act of 1973 to provide for consideration of the totality of conservation measures in determining the impact of proposed Federal agency action, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 6346 is to amend the Endangered Species Act of 1973 to provide for consideration of the totality of conservation measures in determining the impact of proposed Federal agency action.

BACKGROUND AND NEED FOR LEGISLATION

The Endangered Species Act of 1973 (ESA, 16 U.S.C. 1531 et seq.) sets out the broad goal of conserving and recovering species facing extinction. The law authorizes federal agencies to identify imperiled species and list them as either threatened or endangered,

as appropriate.¹ The law further requires agencies to take necessary actions to conserve those species and their habitats.² The Secretary of the Interior, through the U.S. Fish and Wildlife Service (FWS), has responsibility for plants, wildlife and inland fisheries. The Secretary of Commerce, through the National Marine Fisheries Service (NMFS) is responsible for implementing the ESA with respect to ocean-going fish and some marine mammals.³ Congress made its most significant amendments to ESA in 1978, 1982, and 1988, although the overall framework has remained essentially unchanged since its original enactment in 1973.⁴

Notwithstanding the worthy goal set out by the ESA to conserve and protect species, in the 45 years since its enactment, less than 2 percent of species have recovered enough to warrant removal from the list of endangered and threatened species.⁵ In fact, many of those species were delisted after it was discovered that federal agencies used erroneous data in the original listing.⁶ In total, to date there have been 2,421 listings⁷ under the ESA. In that time the Secretaries have delisted 77 species, but only 47 distinct species have been removed, either entirely or partially throughout their range, due to population recovery.⁸

In addition to failing to achieve meaningful recovery for species, implementation of the ESA disincentivizes conservation and can lead to increased conflict between people and species through unpredictable and expansive restrictions on land use.⁹ Excessive litigation and a lack of transparency in federal ESA decision-making has only exacerbated these problems and reduced the ESA's effectiveness in recovering species.¹⁰

In many cases, implementation of the ESA has caused increased burdens for those living in close proximity to the protected species.¹¹ Often States and local communities have the most knowledge about the species located in their State and can bring the greatest amount of resources to conservation efforts.¹² They are

¹ 16 U.S.C. 1533.

² *Id.*

³ CONG. RESEARCH SERV., RL31654, THE ENDANGERED SPECIES ACT: A PRIMER 15 (2016).

⁴ A History of the Endangered Species Act of 1973, U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR, https://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf (last visited Sept. 18, 2018).

⁵ ECOS Environmental Conservation Online System, Listed Species Summary (Boxscore), U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR, <https://ecos.fws.gov/ecp0/reports/box-score-report> (last visited Sept. 19, 2018).

⁶ ECOS Environmental Conservation Online System, Delisted Species, U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR, <https://ecos.fws.gov/ecp0/reports/delisting-report> (last visited Sept. 19, 2018).

⁷ *Supra*, note 5. This number was determined by adding the total number of species listed as endangered or threatened under the ESA to the total number delisted since the ESA's enactment.

⁸ *Supra*, note 6.

⁹ COMMITTEE ON HOUSE NATURAL RESOURCES, ENDANGERED SPECIES ACT CONGRESSIONAL WORKING GROUP, REPORT FINDINGS AND RECOMMENDATIONS, (2014) available at https://naturalresources.house.gov/uploadedfiles/esa_working_group_final_report_and_recommendations_02_04_14.pdf; See also: *Legislative Hearing on H.R. 424, H.R. 717, H.R. 1274, H.R. 2603, and H.R. 3131: Hearing before the H. Comm. on Natural Resources*, 115th Cong. (2017) (testimony of Kent Holsinger, Manager and Founder, Holsinger Law, LLC) available at https://naturalresources.house.gov/uploadedfiles/testimony_holsinger.pdf.

¹⁰ *Hearing on Examining Policy Impacts of Excessive Litigation Against the Department of the Interior, Before the Subcomm. on Oversight & Investigations of the H. Comm. on Natural Resources*, 115th Cong. (2017), available at https://naturalresources.house.gov/uploadedfiles/hearing_memo_-_ov_hrg_06.28.17.pdf.

¹¹ *Supra*, note 9.

¹² *Legislative Hearing on H.R. 424, H.R. 717, H.R. 1274, H.R. 2603, and H.R. 3131: Hearing before the H. Comm. on Natural Resources*, 115th Cong. (2017) (testimony of Kent Holsinger, Manager and Founder, Holsinger Law, LLC) available at https://naturalresources.house.gov/uploadedfiles/testimony_holsinger.pdf.

eager to stabilize species populations to prevent listings that can have a major negative economic impact on State and local communities through restrictions on land use.¹³ Yet, too often, federal management of threatened and endangered species fails to take advantage of the wealth of knowledge of State and local officials and of the successful conservation measures implemented by States.¹⁴

Despite these shortcomings in how the ESA has been implemented since its enactment, the ESA and its overall goal of conserving and recovering species remains widely popular and accepted.¹⁵ ESA modernization should prioritize effective species recovery while maintaining the core principles of the Act.

The Weigh Habitats Offsetting Locational Effects Act of 2018, or the WHOLE Act, amends ESA to revise how the Secretaries review an agency action to determine whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. Specifically, the bill requires the appropriate Secretary, when making such a determination, to consider the offsetting effects of protection or conservation measures that are already in place or proposed to be implemented as part of the action.

Section 7 of the ESA requires federal agencies to ensure that private projects they authorize or public development they undertake are not likely to impact critical habitat of an endangered or threatened species.¹⁶ As a consequence, federal and private entities seeking to develop on or near critical habitat may attempt to offset the effects of proposed actions by acquiring and managing suitable habitat that can be substituted for the critical habitat.¹⁷ The substituted habitat must be of equivalent size and quality and must be located within the species' habitat range.¹⁸ The substituted habitat must also contain any characteristics deemed essential to the critical habitat designation.¹⁹ In sum, the substituted habitat is functionally equivalent to land designated as critical habitat.

Substitution is a proven, effective mitigation mechanism that benefits listed species while facilitating economic and public development. The unprecedented conservation efforts of private landowners in support of the Lesser Prairie Chicken resulted in approximately 5.8 million acres being dedicated to habitat preservation.²⁰ However, ambiguity in the relevant ESA provisions and subsequent regulations have resulted in uncertainty as to whether

¹³*Id.*

¹⁴See e.g., Letter from John Hickenlooper, Governor, State of Colorado, and Matt Mead, Governor, State of Wyoming, to Steve Ellis, Deputy Director, Bureau of Land Management, U.S. Dept of the Interior, and Leslie Weldon, Deputy Chief, National Forest System, U.S. Forest Service, U.S. Dept of Agriculture, Sept. 29, 2014, available at http://westgov.org/images/editor/LTR_GSG_Rollup_Mtgs_FINAL.pdf.

¹⁵See e.g., Memo from Ben Tulchin, Ben Krompack, and Kiel Brunner, Tulchin Research, to Interested Parties, Jul. 6, 2015, available at <https://earthjustice.org/sites/default/files/files/PollingMemoNationalESASurvey.pdf>.

¹⁶16 U.S.C. § 1533.

¹⁷16 U.S.C. 1539(a)(2); see also 50 C.F.R. 17.22.

¹⁸See *WildEarth Guardians v. United States Fish & Wildlife Serv.*, 622 F. Supp. 2d 1155 (D. Utah 2009) (analysis of mitigation measures taken by incidental take permit applicant).

¹⁹*Id.*

²⁰What We Do, LESSER PRAIRIE CHICKEN INITIATIVE, <http://lpcinitiative.org/our-work/what-we-do/> (last visited Sept. 19, 2018); see also: The Range-Wide Plan for Conserving the Lesser Prairie-Chicken, WESTERN ASSOCIATION OF FISH AND WILDLIFE AGENCIES, <https://wafwalpcrwp.maps.arcgis.com/apps/MapJournal/index.html?appid=291fa9716d44404eabfd69d73ddbc002> (last visited Sept. 19, 2018).

habitat substitution is explicitly authorized.²¹ Promoting flexibility in habitat mitigation practices is essential to the long-term success of the ESA. Congress needs to clarify that allowing landowners to substitute functionally equivalent habitat for critical habitat is authorized under the ESA. This added certainty would encourage and reward private conservation efforts and facilitate economic growth.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This act may be cited as the Weigh Habitats Offsetting Locational Effects Act of 2018, or the WHOLE Act.

Section 2. Consideration of the totality of conservation measures

This section requires the relevant Secretary, when determining whether a federal agency action is likely to jeopardize a listed species or result in the destruction or adverse modification of critical habitat, to consider the offsetting effects of all avoidance, minimization, and other species protection or conservation measures that are already in place or proposed to be implemented as part of the action. This includes the development, improvement, protection, or management of species habitat whether or not it is designated as critical habitat of the affected species.

COMMITTEE ACTION

H.R. 6346 was introduced on July 12, 2018, by Congressman Mike Johnson (R-LA). The bill was referred to the Committee on Natural Resources. On September 26, 2018, the Committee held a hearing on the bill. On September 27, 2018, the Committee met to consider the bill. No amendments were offered, and the bill was ordered favorably reported to the House of Representatives by a roll call vote of 20 yeas and 11 nays, as follows:

²¹ 50 CFR 402.14.

Committee on Natural Resources
U.S. House of Representatives
115th Congress

Date: 09.27.18

Recorded Vote #:4

Meeting on / Amendment on: FC Markup Favorably Report HR 6346 (Rep. Mike Johnson of LA)

| MEMBERS | Yes | No | Pres | MEMBERS | Yes | No | Pres |
|---|-----|----|------|-------------------------------|-----|----|------|
| Mr. Bishop, UT, Chairman | X | | | Mr. Cook, CA | X | | |
| <i>Mr. Grijalva, AZ, Ranking Member</i> | | X | | <i>Mr. McEachin, VA</i> | | | |
| Mr. Young, AK, Chairman Emeritus | X | | | Mr. Westerman, AR | X | | |
| <i>Mrs. Napolitano, CA</i> | | X | | <i>Mr. Brown, MD</i> | | X | |
| Mr. Gohmert, TX, Vice Chairman | | | | Mr. Graves, LA | X | | |
| <i>Ms. Bordallo, Guam</i> | | X | | <i>Mr. Clay, MO</i> | | | |
| Mr. Lamborn, CO | X | | | Mr. Hice, GA | X | | |
| <i>Mr. Costa, CA</i> | X | | | <i>Mr. Gomez, CA</i> | | | |
| Mr. Wittman, VA | X | | | Mrs. Radewagen, AS | | | |
| <i>Mr. Sablan, CNMI</i> | | | | <i>Ms. Velázquez, NY</i> | | | |
| Mr. McClintock, CA | X | | | Mr. Webster, FL | X | | |
| <i>Ms. Tsongas, MA</i> | | X | | Mr. Bergman, MI | X | | |
| Mr. Pearce, NM | | | | Ms. Cheney, WY | X | | |
| <i>Mr. Huffman, CA</i> | | X | | Mr. Johnson, LA | X | | |
| Mr. Thompson, PA | X | | | Ms. González-Colón, PR | | | |
| <i>Mr. Lowenthal, CA</i> | | | | Mr. Gianforte, MT | X | | |
| Mr. Gosar, AZ | X | | | Mr. Curtis, UT | X | | |
| <i>Mr. Beyer, VA</i> | | X | | | | | |
| Mr. Labrador, ID | | | | | | | |
| <i>Mr. Gallego, AZ</i> | | X | | | | | |
| Mr. Tipton, CO | X | | | | | | |
| <i>Ms. Hanabusa, HI</i> | | X | | | | | |
| Mr. LaMalfa, CA | X | | | | | | |
| <i>Ms. Barragán, CA</i> | | X | | | | | |
| Mr. Denham, CA | | | | | | | |
| <i>Mr. Soto, FL</i> | | X | | TOTAL: | 20 | 11 | |

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII AND CONGRESSIONAL BUDGET ACT

1. Cost of Legislation and the Congressional Budget Act. With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for the bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 15, 2018.

Hon. ROB BISHOP,
*Chairman, Committee on Natural Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 6346, the WHOLE Act of 2018.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Janani Shankaran.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 6346 WHOLE Act of 2018

Under the Endangered Species Act, the U.S. Fish and Wildlife Service (USFWS) or the National Oceanic and Atmospheric Administration (NOAA) may issue a biological opinion on whether a federal agency action—such as the permitting of a construction project—is likely to jeopardize the continued existence of a species or result in habitat modification or destruction. H.R. 6346 would require USFWS and NOAA to consider in those opinions any offsetting effects of protection and conservation measures already in place or that are proposed as part of the agency action.

CBO expects that under the bill, the agencies would issue a rule on how they would implement the new requirement. Based on the costs of similar tasks, CBO estimates that those costs would be less than \$500,000 over the 2019–2023 period; such spending would be subject to the availability of appropriated funds.

H.R. 6346 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 6346 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 6346 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Janani Shankaran. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

2. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to amend the Endangered Species Act of 1973 to provide for consideration of the totality of conservation measures in determining the impact of proposed Federal agency action.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

COMPLIANCE WITH H. RES. 5

Directed Rule Making. This bill contains no directed rulemakings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95-220, as amended by Public Law 98-169) as relating to other programs.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT OF 1973

* * * * *

INTERAGENCY COOPERATION

SEC. 7. (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") 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 of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) OPINION OF SECRETARY.—(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required;

(II) the information that is required to complete the consultation; and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion based by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(C) *In determining whether a Federal agency action is likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the critical habitat of a species, the Secretary shall consider the offsetting effects of all avoidance, minimization, and other species-protection or conservation measures that are already in place or proposed to be implemented as part of the action, including the development, improvement, protection, or management of species habitat whether or not it is designated as critical habitat of such species.*

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972; the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with

by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) BIOLOGICAL ASSESSMENT.—(1) To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as in mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) LIMITATION ON COMMITMENT OF RESOURCES.—After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).

(e)(1) ESTABLISHMENT OF COMMITTEE.—There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this action for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

- (A) The Secretary of Agriculture.
- (B) The Secretary of the Army.
- (C) The Chairman of the Council of Economic Advisors.
- (D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) REGULATIONS.—Not later than 90 days after the date of enactment of the Endangered Species Act Amendments of 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) APPLICATION FOR EXEMPTION AND REPORT TO THE COMMITTEE.—(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for

consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d);
or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A) (i), (ii) and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b) (1) and (2) thereof) of title 5, United States Code, and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability and reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of

any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) EXEMPTION.—(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4), and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) REVIEW BY SECRETARY OF STATE.—Notwithstanding any other provision of this Act, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) SPECIAL PROVISIONS.—An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.): *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(1) COMMITTEE ORDERS.—(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) NOTICE.—The 60-day notice requirement of section 11(g) of this Act shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) JUDICIAL REVIEW.—Any person, as defined by section 3(13) of this Act, may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of title 28, United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) EXEMPTION AS PROVIDING EXCEPTION ON TAKING OF ENDANGERED SPECIES.—Notwithstanding sections 4(d) and 9(a)(1)(B) and (C) of this Act, sections 101 and 102 of the Marine Mammal Protection Act of 1972, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) EXEMPTIONS IN PRESIDENTIALLY DECLARED DISASTER AREAS.—In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

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DISSENTING VIEWS

This legislation is part of a package of nine Republican bills, spearheaded by the Western Caucus, introduced late in the second session of this Congress, and designed to destroy the Endangered Species Act. Each bill has its own, logic-defying, acronym.

H.R. 6346 would fundamentally weaken the federal agency consultation process under Section 7 of the Endangered Species Act. The bill directs the Secretary to consider potential, nonbinding avoidance, minimization, or other conservation measures when determining whether a proposed action is likely to jeopardize an imperiled species or their habitat. The bill also allows the Secretary to consider any conservation activities that occur outside critical habitat during the consultation process, even those that have not been implemented. Therefore, this bill would increase the probability that a federal agency action would jeopardize the continued existence of a listed species and cause harm to critical habitats.

For these reasons, we oppose the bill as reported.

RAÚL M. GRIJALVA,
*Ranking Member, Committee
on Natural Resources.*

JARED HUFFMAN.

A. DONALD MCEACHIN.

WM. LACY CLAY.

GRACE F. NAPOLITANO.

NANETTE DIAZ BARRAGÁN

NIKI TSONGAS.

DONALD S. BEYER, JR.

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