

PROVIDING ESA TIMING IMPROVEMENTS THAT INCREASE  
OPPORTUNITIES FOR NONLISTING ACT OF 2018

DECEMBER 21, 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. 6355]

The Committee on Natural Resources, to whom was referred the bill (H.R. 6355) to amend the Endangered Species Act of 1973 to define petition backlogs and provide expedited means for discharging petitions during such a backlog, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Providing ESA Timing Improvements That Increase Opportunities for Nonlisting Act of 2018” or the “PETITION Act of 2018”.

**SEC. 2. DEFINITIONS.**

Section 3 of the Endangered Species Act of 1973 (16 U.S.C. 1532) is amended—

- (1) by moving the margins of paragraphs (1) through (21) 2 ems to the right;
- (2) by inserting before the text the following: “(a) IN GENERAL.—”; and
- (3) by adding at the end the following:

“(b) DEFINITIONS RELATED TO PETITIONS.—In this Act:

“(1) 90-DAY PETITION BACKLOG.—The term ‘90-day petition backlog’ means such a backlog declared by the Secretary under section 4(b)(3)(E).

“(2) 12-MONTH PETITION BACKLOG.—The term ‘12-month petition backlog’ means such a backlog declared by the Secretary under section 4(b)(3)(E).

“(3) BACKLOG SCHEDULE.—The term ‘backlog schedule’ means a comprehensive, regularly updated compendium of petitioned-for species that are the subject of a 90-day petition backlog or a 12-month petition backlog—

“(A) that consists of—

“(i) a list of petitions to add a species to a list of species under section 4(c), including petitions to move a species from the list of threatened species to the list of endangered species; and

“(ii) a list of petitions to remove a species from a list of species under section 4(c), including petitions to move a species from the list of endangered species to the list of threatened species; and

“(B) in which the petitions in each such list appear in the order in which the petitions were submitted to the Secretary.

“(4) BACKLOG PROCEDURES.—The term ‘backlog procedures’ means the actions taken by the Secretary—

“(A) under section 4(b)(3)(G) following the declaration of a 90-day petition backlog; or

“(B) under section 4(b)(3)(H) following the declaration of a 12-month petition backlog.

“(5) PETITIONED-FOR SPECIES.—The term ‘petitioned-for species’ means a species that has been identified in a petition presented under subparagraph (A) or (B) of section 4(b)(3).”.

### SEC. 3. BACKLOG DECLARATION AND PROCEDURES.

(a) IN GENERAL.—Section 4(b)(3) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(3)) is amended by adding at the end the following:

“(E)(i) The Secretary shall—

“(I) declare a 90-day petition backlog at any time the total number of species for which a petition is presented to the Secretary under subparagraph (A) that has not been the subject of a finding by the Secretary within the timeframe established under such subparagraph exceeds 5 percent of the number of species for which such petitions have been presented during the preceding 15 years;

“(II) submit a backlog schedule for such backlog to—

“(aa) the President;

“(bb) the Chairman and ranking minority Member of the Committee on Environment and Public Works of the Senate; and

“(cc) the Chairman and ranking minority Member of the Committee on Natural Resources of the House of Representatives; and

“(III) comply with backlog procedures under subparagraph (G) during the period such backlog is in effect.

“(ii) The Secretary shall—

“(I) declare a 12-month petition backlog at any time the total number of species for which a petition is being considered by the Secretary under subparagraph (B) that has not been the subject of a finding by the Secretary within the timeframe established under such subparagraph exceeds 5 percent of the number of species for which such petitions have been presented during the preceding 15 years;

“(II) submit a backlog schedule for such backlog to—

“(aa) the President;

“(bb) the Chairman and ranking minority Member of the Committee on Environment and Public Works of the Senate; and

“(cc) the Chairman and ranking minority Member of the Committee on Natural Resources of the House of Representatives; and

“(III) comply with backlog procedures under subparagraph (H) during the period such declaration is in effect.

“(iii) Not later than 90 days after declaring a 90-day petition backlog or 12-month petition backlog, and every 90 days thereafter during the period such backlog is in effect, the Secretary shall submit to the recipients under clause (ii)(II) and (iii)(II), respectively, an updated backlog schedule that contains—

“(I) a list of petitioned-for species for which a finding had been made since the last submission of the backlog schedule under such clause;

“(II) the outcomes of findings for all petitioned-for species for which a finding has been made since the last submission of the backlog schedule under such clause; and

“(III) a summary of the bases of all findings for any petitioned-for species for which a finding has been made since the preceding submission of the backlog.

“(F) The Secretary shall terminate a 90-day petition backlog or 12-month petition backlog at such time as the requirements for declaring such backlog under subparagraph (E)(i) or (E)(ii), respectively, are not fulfilled.

“(G) During the effective period of a 90-day petition backlog—

“(i) the requirement under subparagraph (A) to make a finding within 90 days shall not apply with respect to any species that is the subject of a petition included in the list under section 2(b)(3)(A)(i);

“(ii) except as provided in clause (iii), the Secretary shall not make any finding under subparagraph (A) with respect to any species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule, until the earlier of—

“(I) the date the Secretary terminates the backlog under subparagraph (F);

“(II) the date the applicable backlog schedule consists of only the list under such section; or

“(III) the date the only petitioned-for species in the backlog schedule to which the Secretary has not devoted sufficient resources so as to issue such a finding within 90 days are those in the list under such section; and

“(iii) the Secretary is deemed to have made a finding under subparagraph (A) that each petition for a species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule does not present substantial scientific or commercial information indicating that the petitioned action may be warranted, effective upon the expiration of the 180-day period beginning on the date the petition was submitted.

“(H) Except as provided in subparagraph (I)—

“(i) after declaring a 12-month petition backlog under subparagraph (E)(ii) and before taking any actions under clause (ii) of this subparagraph, the Secretary shall assign each petition and petitioned-for species to be considered under such clause to one of the five priority bins referred to in the notice issued by the United States Fish and Wildlife Service entitled ‘Methodology for Prioritizing Status Reviews and Accompanying 12-month findings on Petitions for Listing Under the Endangered Species Act (81 Fed. Reg. 49248 (July 27, 2016))’; and

“(ii) during the effective period of such 12-month petition backlog under subparagraph (E)(ii)—

“(I) the requirement under subparagraph (B) to make a finding within 12 months shall not apply with respect to any species that is the subject of a petition included in the list under section 2(b)(3)(A)(i);

“(II) the Secretary shall consider under this paragraph only petitions for species included in the list under section 2(b)(3)(A)(ii) in the applicable backlog schedule, that were submitted more than 12 months before the establishment of the backlog;

“(III) except as provided in subclause (IV), the Secretary shall not make any finding under subparagraph (B) with respect to any species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule, until the earlier of—

“(aa) the date the Secretary terminates the backlog under subparagraph (F);

“(bb) the date the applicable backlog schedule consists of only the list under such section; or

“(cc) the date the only petitioned-for species in the backlog schedule to which the Secretary has not devoted sufficient resources so as to issue such a finding within 12 months are those in the list under such section; and

“(IV) the Secretary is deemed to have made a finding under subparagraph (B)(i) for each species included in the list under section 2(b)(3)(A)(i) that the petitioned action is not warranted—

“(aa) effective upon the expiration of the 18-month period beginning on the date the petition was submitted, if the Secretary has not assigned the species to the ‘Highest Priority—Critically Imperiled’, ‘Strong Data Already Available on Status’ priority bin or ‘New Science Underway to Inform Key Uncertainties’ priority bin referred to in the notice referred to in clause (i); or

“(bb) effective upon the expiration of the 24-month period beginning on the date the petition was submitted, if the Secretary has assigned the species to the ‘Strong Data Already Available on Status’ priority bin or ‘New Science Underway to Inform Key Uncertainties’ priority bin referred to in the notice referred to in clause (i).

“(I)(i) In the case of the first 12-month petition backlog under subparagraph (E)(ii)—

“(I) item (aa) of subparagraph (H)(ii)(IV) shall be applied by substituting ‘30-month’ for ‘18-month’; and

“(II) item (bb) of subparagraph (H)(ii)(IV) shall be applied by substituting ‘36-month’ for ‘24-month’.

“(ii) The Secretary may not under subparagraph (H)(i) change the assignment of a petition or petitioned-for species from one priority bin to another priority bin.

“(J) In the case of findings under subparagraph (G)(iii) and (H)(ii)(IV), the publication under subparagraph (A) or (B)(i), respectively, may consist solely of a notice of each finding.

“(K)(i) Except as otherwise provided in this Act, the Secretary shall regularly maintain on the internet site of the United States Fish and Wildlife Service a publically available database of petitions referred to in this paragraph and species otherwise evaluated under subsection (a).

“(ii) The database shall contain information about each petitioned-for species including—

“(I) the date a petition for such species was submitted;

“(II) the person who submitted the petition;

“(III) the current status of the petition within the statutory and agency process, including the most recent agency action taken;

“(IV) a web link to any documents received under this paragraph that constituted the petition for such species;

“(V) a web link to any materials the Secretary has received from State or local governments pertaining to petitions to list such species;

“(VI) the outcomes of all prior petitioning or listing procedures for such species; and

“(VII) the outcomes of all prior litigation against the Federal Government on the basis of a petition for or listing of such species, including actions or agreements by the Federal Government to—

“(aa) dispense monies to litigating parties or counsel;

“(bb) promulgate rules as a direct or indirect result of litigation outcomes or agreements;

“(cc) resolve any matter related to the petition or a petitioned-for species by a certain date, or otherwise;

“(dd) conduct further research or analysis related to the petition or petitioned-for species; or

“(ee) engage in any other activity as a result of the terms of litigation settlements or court orders related to such petitions or petitioned-for species.

“(L) Notwithstanding subparagraph (C)(ii), a finding by the Secretary under subparagraph (G)(iii), and any failure by the Secretary in the effective period of a 90-day petition backlog to make a finding under subparagraph (A) with respect to any species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule, is not subject to judicial review.

“(M)(i) The Secretary shall enter into a contract with any person under which the person agrees to reimburse the Federal Government for all costs incurred for review of and decision upon any petition under this Act to add a species to a list of species under section 4(c), including petitions to move a species from the list of threatened species to the list of endangered species.

“(ii) Such a contract—

“(I) shall require the person to reimburse such costs monthly during the period the petition is under review by the Secretary; and

“(II) if payment of reimbursement is made in accordance with subclause (I) without lapse, shall require the Secretary, notwithstanding any other provision of this Act, to—

“(aa) issue a decision on the petition; and

“(bb) continuously study, review, or render such a decision during the period the contract is in effect.”

(b) CONFORMING AMENDMENT.—Section 4(b)(3)(C) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(3)(C)) is amended—

(1) by striking clause (ii); and

(2) by redesignating clause (iii) as clause (ii).

(c) EFFECT OF DISMISSAL OF PETITION.—Section 4(b)(3) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(3)), as amended by subsection (a), is further amended by adding at the end the following:

“(N) Dismissal of a petition by backlog procedures shall not affect the review of any subsequent petition for any species”.

#### PURPOSE OF THE BILL

The purpose of H.R. 6355 is to amend the Endangered Species Act of 1973 to define petition backlogs and provide expedited means for discharging petitions during such a backlog.

#### 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.<sup>1</sup> The law further requires agencies to take necessary actions to conserve those species and their habitats.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

Despite 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.<sup>5</sup> In fact, many of those species were delisted after it was discovered that federal agencies used erroneous data in the original listing.<sup>6</sup> In total, to date there have been 2,421 listings<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> Excessive liti-

<sup>1</sup> 16 U.S.C. 1533.

<sup>2</sup> *Id.*

<sup>3</sup> Cong. Research Serv., RL31654, *The Endangered Species Act: A Primer* 15 (2016).

<sup>4</sup> 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](https://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf) (last visited Sept. 18, 2018).

<sup>5</sup> 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/boxscore-report> (last visited Sept. 19, 2018).

<sup>6</sup> 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).

<sup>7</sup> *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.

<sup>8</sup> *Supra*, note 6.

<sup>9</sup> 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](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](https://naturalresources.house.gov/uploadedfiles/testimony_holsinger.pdf).

gation and a lack of transparency in federal ESA decision-making has only exacerbated these problems and reduced the ESA's effectiveness in recovering species.<sup>10</sup>

In many cases, implementation of the ESA has caused increased burdens for those living in close proximity to the protected species.<sup>11</sup> 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.<sup>12</sup> They are 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> ESA modernization should prioritize effective species recovery while maintaining the core principles of the Act.

Section 4 of the ESA outlines specific timelines which must be met when the relevant Secretary receives a petition to list a species for protection under the ESA.<sup>16</sup> These timelines bind the Secretary when making an initial determination whether the petition presents substantial information to warrant agency action, whether that agency action should proceed with delisting, when designating critical habitat for a listed species, and when conducting a five-year review of a protected species.<sup>17</sup> If a specific timeline is not met, any person or entity may file a lawsuit to compel Secretarial action.<sup>18</sup> With no legal defense for missing a statutory deadline, the Secretary is forced to shift valuable conservation resources when responding to a growing number of petitions, or lawsuits based on missing petition deadlines, rather than adequately accomplish all his or her ESA section 4 duties.<sup>19</sup>

<sup>10</sup> *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](https://naturalresources.house.gov/uploadedfiles/hearing_memo_-_ov_hrg_06.28.17.pdf).

<sup>11</sup> *Supra*, note 9.

<sup>12</sup> *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](https://naturalresources.house.gov/uploadedfiles/testimony_holsinger.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> *See 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. Dep't of the Interior, and Leslie Weldon, Deputy Chief, National Forest System, U.S. Forest Service, U.S. Dep't of Agriculture, Sept. 29, 2014, available at [http://westgov.org/images/selector/LTR\\_GSG\\_Rollup\\_Mtgs\\_FINAL.pdf](http://westgov.org/images/selector/LTR_GSG_Rollup_Mtgs_FINAL.pdf).

<sup>15</sup> *See 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>.

<sup>16</sup> 16 U.S.C. 1533; The Secretaries may also initiate a review to determine if the listing or delisting of a species may be warranted. In addition, the Secretaries may initiate, or a petition can request, a review to determine if the status of a listed species should be reclassified from either endangered to threatened (downlisted) or threatened to endangered (uplisted).

<sup>17</sup> 16 U.S.C. 1533(b)(3).

<sup>18</sup> 16 U.S.C. 1540(g).

<sup>19</sup> The FWS and NMFS' ESA section 4 programs encompass all actions related to listing species as threatened or endangered, including making findings on petitions to add, remove, or reclassify species from either of these lists (16 U.S.C. § 1533(b)(3)); designating and revising critical habitat (16 U.S.C. § 1533(a)(3)); and conducting 5-year status reviews of listed species (16 U.S.C. § 1533(c)(2)(A)).

The process to list a species may begin in either one of two ways: through a petition submitted to the relevant Secretary or through a review initiated by the Secretary.<sup>20</sup> When a petition to list a species is submitted, the Secretary must then follow a multi-step process to determine whether a species listing is warranted.<sup>21</sup> See Appendix I/Figure 2. This multi-step process is further governed by statutory deadlines placed on the Secretaries, ranging from the 90-day initial response deadline to the 12-month final determination deadline.<sup>22</sup> See Appendix II/Table 1.

Over the past couple of decades, a high volume of petitions has prevented the Secretaries from adequately carrying out their ESA section 4 duties.<sup>23</sup> For example, between fiscal years 2005 and 2015, the Secretaries received 170 petitions to list 1,446 species.<sup>24</sup> Without the ability to postpone action on petitions and faced with statutory deadlines for responding to each petition, the Secretaries have faced a high volume of litigation impacting valuable conservation resources.<sup>25</sup>

An even greater issue is the weaponization of these deadlines by some outside groups and individuals to force the Secretaries' hands. On average, about 13 deadline suits were filed between fiscal years 2005 and 2015 against the Department of the Interior for failure to comply with a statutory deadline.<sup>26</sup> Two environmental groups, the Center for Biological Diversity and WildEarth Guardians, filed more than half of the lawsuits between 2005 and 2015.<sup>27</sup> A breakdown of the number and type of section 4 actions involving deadline lawsuits is outlined in Appendix III/Table 2.

When a suit is brought against the Secretaries for failure to meet the statutory deadlines, most of these suits are resolved through settlement agreements.<sup>28</sup> With no legal defense for missing a deadline, the Secretaries often enter into settlement agreements under which they must prioritize petitions which are the subject of a suit.<sup>29</sup> With such a high volume of petitions and ever-increasing litigation, the Secretaries faces a situation where nearly all petitions become subject to immediate prioritization, and resources are devoted fully to responses rather than other ESA section 4 activities such as habitat planning. Growing litigation continues "tying up agency resources and leaving little money to address new species petitions and tackle the candidate backlog" for petitions not the subject of a settlement agreement.<sup>30</sup>

<sup>20</sup> *Supra* note 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Supra* note 2.

<sup>23</sup> U.S. Fish and Wildlife Service, *Managing the U.S. Fish and Wildlife Service's Endangered Species Act Listing Program, Response to House Report 111-180, A Directive by the Committee on Appropriations to Review the Process for Determining the Status of Species* (May 2010). See also Benjamin Jesup, *Endless War or End This War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multi-District Litigation Settlements*, Vt. J. Env. L. 327 (2013).

<sup>24</sup> *Supra* note 6.

<sup>25</sup> *Supra* note 9.

<sup>26</sup> *Supra* note 6.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; See also Allison Winter, Patrick Reis & E&E, ENDANGERED SPECIES: Obama admin confronts 'candidate species' backlog E&E News (2009), <https://www.eenews.net/stories/81931>.

<sup>30</sup> Allison Winter, Patrick Reis & E&E, ENDANGERED SPECIES: Obama admin confronts 'candidate species' backlog E&E News (2009), <https://www.eenews.net/stories/81931>. (Douglas Krofta serves as the U.S. Fish and Wildlife Service's Chief in the Branch of Listing, Endangered Species Program).

H.R. 6355, the Providing ESA Timing Improvements That Increase Opportunities for Nonlisting Act of 2018, or the PETITION Act, would create a method for the Secretaries to manage a growing number of petitions to list while discouraging those seeking to weaponize the process. The legislation allows for the relevant Secretary to declare a petition backlog at different points throughout the petition process when there exists such an excess number of submitted petitions that the Secretary would surely face yet another lawsuit to enforce a deadline. This petition backlog declaration would trigger a process by which the Secretary could take additional time to prioritize and work through submitted petitions. Additionally, the process would allow for a more rapid disposal of frivolous petitions, discouraging those seeking to set the stage for a lawsuit by drowning the Secretary in frivolous petitions.

#### SECTION-BY-SECTION ANALYSIS

Section 1. Short title. The act may be cited as the “Providing ESA Timing Improvements That Increase Opportunities for Nonlisting Act of 2018” or the “PETITION Act of 2018.”

Section 2. Definitions. This section amends section 2 of the ESA to define additional terms used by this Act.

Section 3. Backlog declaration and procedures. This section amends section 4 of the ESA to establish a set of procedures by which the relevant Secretary may declare a “petition backlog” at different points in the listing petition process. This section further outlines what would occur with different categorized listing petitions once sorted by priority during a “petition backlog.” Finally, this section establishes a public database where individuals may search petitioned-for species listings.

#### COMMITTEE ACTION

H.R. 6355 was introduced on July 12, 2018, by Congressman Bruce Westerman (R-AR). 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. Congressman Westerman offered an amendment designated 040; it was adopted by voice vote. No additional amendments were offered, and the bill, as amended, was ordered favorably reported to the House of Representatives by a roll call vote of 19 yeas and 14 nays, as follows:



**Committee on Natural Resources**

U.S. House of Representatives

115th Congress

Date: 09.27.18

Recorded Vote #:5

Meeting on / Amendment on: FC Markup Favorably Report HR 6355 (Rep. Bruce Westerman)

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
<b>Mr. Bishop, UT, Chairman</b>	X			<b>Mr. Cook, CA</b>	X		
<i>Mr. Grijalva, AZ, Ranking Member</i>		X		<i>Mr. McEachin, VA</i>			
<b>Mr. Young, AK, Chairman Emeritus</b>	X			<b>Mr. Westerman, AR</b>	X		
<i>Mrs. Napolitano, CA</i>		X		<i>Mr. Brown, MD</i>		X	
<b>Mr. Gohmert, TX, Vice Chairman</b>				<b>Mr. Graves, LA</b>	X		
<i>Ms. Bordallo, Guam</i>		X		<i>Mr. Clay, MO</i>		X	
<b>Mr. Lamborn, CO</b>	X			<b>Mr. Hice, GA</b>	X		
<i>Mr. Costa, CA</i>		X		<i>Mr. Gomez, CA</i>		X	
<b>Mr. Wittman, VA</b>				<b>Mrs. Radewagen, AS</b>			
<i>Mr. Sablan, CNMI</i>				<i>Ms. Velázquez, NY</i>			
<b>Mr. McClintock, CA</b>	X			<b>Mr. Webster, FL</b>	X		
<i>Ms. Tsongas, MA</i>		X		<b>Mr. Bergman, MI</b>	X		
<b>Mr. Pearce, NM</b>				<b>Ms. Cheney, WY</b>	X		
<i>Mr. Huffman, CA</i>		X		<b>Mr. Johnson, LA</b>	X		
<b>Mr. Thompson, PA</b>	X			<b>Ms. González-Colón, PR</b>			
<i>Mr. Lowenthal, CA</i>				<b>Mr. Gianforte, MT</b>	X		
<b>Mr. Gosar, AZ</b>	X			<b>Mr. Curtis, UT</b>	X		
<i>Mr. Beyer, VA</i>		X					
<b>Mr. Labrador, ID</b>	X						
<i>Mr. Gallego, AZ</i>		X					
<b>Mr. Tipton, CO</b>	X						
<i>Ms. Hanabusa, HI</i>		X					
<b>Mr. LaMalfa, CA</b>	X						
<i>Ms. Barragán, CA</i>		X					
<b>Mr. Denham, CA</b>							
<i>Mr. Soto, FL</i>		X		<b>TOTAL:</b>	19	14	

## 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 requested but not received an estimate for the bill from the Director of the Congressional Budget Office.

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 define petition backlogs and provide expedited means for discharging petitions during such a backlog.

## 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 (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

**ENDANGERED SPECIES ACT OF 1973**

\* \* \* \* \*

DEFINITIONS

SEC. 3. (a) *IN GENERAL.*—*For the purposes of this Act—*

(1) The term “alternative courses of action” means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term “commercial activity” means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibitions of commodities by museums or similar cultural or historical organizations.

(3) The terms “conserve,” “conserving,” and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term “Convention” means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(5)(A) The term “critical habitat” for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection

under the provisions of this Act would present an overwhelming and overriding risk to man.

(7) The term "Federal agency" means any department, agency, or instrumentality of the United States.

(8) The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term "foreign commerce" includes, among other things, any transaction—

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term "import" means to land on, bring into, or introduce into or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(12) The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 7, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) to such agency action.

(13) The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

(14) The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(17) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term “State agency” means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(21) The term “United States,” when used in a geographical context, includes all States.

(b) *DEFINITIONS RELATED TO PETITIONS.—In this Act:*

(1) *90-DAY PETITION BACKLOG.—The term “90-day petition backlog” means such a backlog declared by the Secretary under section 4(b)(3)(E).*

(2) *12-MONTH PETITION BACKLOG.—The term “12-month petition backlog” means such a backlog declared by the Secretary under section 4(b)(3)(E).*

(3) *BACKLOG SCHEDULE.—The term “backlog schedule” means a comprehensive, regularly updated compendium of petitioned-for species that are the subject of a 90-day petition backlog or a 12-month petition backlog—*

(A) *that consists of—*

(i) *a list of petitions to add a species to a list of species under section 4(c), including petitions to move a species from the list of threatened species to the list of endangered species; and*

(ii) *a list of petitions to remove a species from a list of species under section 4(c), including petitions to move a species from the list of endangered species to the list of threatened species; and*

(B) *in which the petitions in each such list appear in the order in which the petitions were submitted to the Secretary.*

(4) *BACKLOG PROCEDURES.—The term “backlog procedures” means the actions taken by the Secretary—*

(A) *under section 4(b)(3)(G) following the declaration of a 90-day petition backlog; or*

(B) *under section 4(b)(3)(H) following the declaration of a 12-month petition backlog.*

(5) *PETITIONED-FOR SPECIES.—The term “petitioned-for species” means a species that has been identified in a petition presented under subparagraph (A) or (B) of section 4(b)(3).*

#### DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) GENERAL.—(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—

(A) in any case in which the Secretary of Commerce determines that such species should—

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species, he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should—

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species, he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 9, including the prohibition preventing extinction and taking of endangered species and threatened species.

(b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after tak-

ing into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted but that—

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c)

and to remove from such lists species for which the protections of the Act are no longer necessary, in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

[(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.]

[(iii) (ii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 to prevent a significant risk to the well being of any such species.

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(E)(i) *The Secretary shall—*

(I) *declare a 90-day petition backlog at any time the total number of species for which a petition is presented to the Secretary under subparagraph (A) that has not been the subject of a finding by the Secretary within the timeframe established under such subparagraph exceeds 5 percent of the number of species for which such petitions have been presented during the preceding 15 years;*

(II) *submit a backlog schedule for such backlog to—*

(aa) *the President;*

(bb) *the Chairman and ranking minority Member of the Committee on Environment and Public Works of the Senate; and*

(cc) *the Chairman and ranking minority Member of the Committee on Natural Resources of the House of Representatives; and*

(III) *comply with backlog procedures under subparagraph (G) during the period such backlog is in effect.*

(ii) *The Secretary shall—*

(I) *declare a 12-month petition backlog at any time the total number of species for which a petition is being considered by the Secretary under subparagraph (B) that has not been the subject of a finding by the Secretary within the timeframe es-*



established under such subparagraph exceeds 5 percent of the number of species for which such petitions have been presented during the preceding 15 years;

(II) submit a backlog schedule for such backlog to—

(aa) the President;

(bb) the Chairman and ranking minority Member of the Committee on Environment and Public Works of the Senate; and

(cc) the Chairman and ranking minority Member of the Committee on Natural Resources of the House of Representatives; and

(III) comply with backlog procedures under subparagraph (H) during the period such declaration is in effect.

(iii) Not later than 90 days after declaring a 90-day petition backlog or 12-month petition backlog, and every 90 days thereafter during the period such backlog is in effect, the Secretary shall submit to the recipients under clause (ii)(II) and (iii)(II), respectively, an updated backlog schedule that contains—

(I) a list of petitioned-for species for which a finding had been made since the last submission of the backlog schedule under such clause;

(II) the outcomes of findings for all petitioned-for species for which a finding has been made since the last submission of the backlog schedule under such clause; and

(III) a summary of the bases of all findings for any petitioned-for species for which a finding has been made since the preceding submission of the backlog.

(F) The Secretary shall terminate a 90-day petition backlog or 12-month petition backlog at such time as the requirements for declaring such backlog under subparagraph (E)(i) or (E)(ii), respectively, are not fulfilled.

(G) During the effective period of a 90-day petition backlog—

(i) the requirement under subparagraph (A) to make a finding within 90 days shall not apply with respect to any species that is the subject of a petition included in the list under section 2(b)(3)(A)(i);

(ii) except as provided in clause (iii), the Secretary shall not make any finding under subparagraph (A) with respect to any species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule, until the earlier of—

(I) the date the Secretary terminates the backlog under subparagraph (F);

(II) the date the applicable backlog schedule consists of only the list under such section; or

(III) the date the only petitioned-for species in the backlog schedule to which the Secretary has not devoted sufficient resources so as to issue such a finding within 90 days are those in the list under such section; and

(iii) the Secretary is deemed to have made a finding under subparagraph (A) that each petition for a species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule does not present substantial scientific or commercial information indicating that the petitioned action may be warranted, effective upon the expiration of the 180-day period beginning on the date the petition was submitted.

(H) Except as provided in subparagraph (I)—

(i) after declaring a 12-month petition backlog under subparagraph (E)(ii) and before taking any actions under clause (ii) of this subparagraph, the Secretary shall assign each petition and petitioned-for species to be considered under such clause to one of the five priority bins referred to in the notice issued by the United States Fish and Wildlife Service entitled “Methodology for Prioritizing Status Reviews and Accompanying 12-month findings on Petitions for Listing Under the Endangered Species Act (81 Fed. Reg. 49248 (July 27, 2016))”; and

(ii) during the effective period of such 12-month petition backlog under subparagraph (E)(ii)—

(I) the requirement under subparagraph (B) to make a finding within 12 months shall not apply with respect to any species that is the subject of a petition included in the list under section 2(b)(3)(A)(i);

(II) the Secretary shall consider under this paragraph only petitions for species included in the list under section 2(b)(3)(A)(ii) in the applicable backlog schedule, that were submitted more than 12 months before the establishment of the backlog;

(III) except as provided in subclause (IV), the Secretary shall not make any finding under subparagraph (B) with respect to any species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule, until the earlier of—

(aa) the date the Secretary terminates the backlog under subparagraph (F);

(bb) the date the applicable backlog schedule consists of only the list under such section; or

(cc) the date the only petitioned-for species in the backlog schedule to which the Secretary has not devoted sufficient resources so as to issue such a finding within 12 months are those in the list under such section; and

(IV) the Secretary is deemed to have made a finding under subparagraph (B)(i) for each species included in the list under section 2(b)(3)(A)(i) that the petitioned action is not warranted—

(aa) effective upon the expiration of the 18-month period beginning on the date the petition was submitted, if the Secretary has not assigned the species to the “Highest Priority—Critically Imperiled”, “Strong Data Already Available on Status” priority bin or “New Science Underway to Inform Key Uncertainties” priority bin referred to in the notice referred to in clause (i); or

(bb) effective upon the expiration of the 24-month period beginning on the date the petition was submitted, if the Secretary has assigned the species to the “Strong Data Already Available on Status” priority bin or “New Science Underway to Inform Key Uncertainties” priority bin referred to in the notice referred to in clause (i).

(I)(i) *In the case of the first 12-month petition backlog under subparagraph (E)(ii)—*

(I) *item (aa) of subparagraph (H)(ii)(IV) shall be applied by substituting “30-month” for “18-month”; and*

(II) *item (bb) of subparagraph (H)(ii)(IV) shall be applied by substituting “36-month” for “24-month”.*

(ii) *The Secretary may not under subparagraph (H)(i) change the assignment of a petition or petitioned-for species from one priority bin to another priority bin.*

(J) *In the case of findings under subparagraph (G)(iii) and (H)(ii)(IV), the publication under subparagraph (A) or (B)(i), respectively, may consist solely of a notice of each finding.*

(K)(i) *Except as otherwise provided in this Act, the Secretary shall regularly maintain on the internet site of the United States Fish and Wildlife Service a publically available database of petitions referred to in this paragraph and species otherwise evaluated under subsection (a).*

(ii) *The database shall contain information about each petitioned-for species including—*

(I) *the date a petition for such species was submitted;*

(II) *the person who submitted the petition;*

(III) *the current status of the petition within the statutory and agency process, including the most recent agency action taken;*

(IV) *a web link to any documents received under this paragraph that constituted the petition for such species;*

(V) *a web link to any materials the Secretary has received from State or local governments pertaining to petitions to list such species;*

(VI) *the outcomes of all prior petitioning or listing procedures for such species; and*

(VII) *the outcomes of all prior litigation against the Federal Government on the basis of a petition for or listing of such species, including actions or agreements by the Federal Government to—*

(aa) *dispense monies to litigating parties or counsel;*

(bb) *promulgate rules as a direct or indirect result of litigation outcomes or agreements;*

(cc) *resolve any matter related to the petition or a petitioned-for species by a certain date, or otherwise;*

(dd) *conduct further research or analysis related to the petition or petitioned-for species; or*

(ee) *engage in any other activity as a result of the terms of litigation settlements or court orders related to such petitions or petitioned-for species.*

(L) *Notwithstanding subparagraph (C)(ii), a finding by the Secretary under subparagraph (G)(iii), and any failure by the Secretary in the effective period of a 90-day petition backlog to make a finding under subparagraph (A) with respect to any species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule, is not subject to judicial review.*

(M)(i) *The Secretary shall enter into a contract with any person under which the person agrees to reimburse the Federal Government for all costs incurred for review of and decision upon any petition under this Act to add a species to a list of species under section 4(c),*

*including petitions to move a species from the list of threatened species to the list of endangered species.*

*(ii) Such a contract—*

*(I) shall require the person to reimburse such costs monthly during the period the petition is under review by the Secretary; and*

*(II) if payment of reimbursement is made in accordance with subclause (I) without lapse, shall require the Secretary, notwithstanding any other provision of this Act, to—*

*(aa) issue a decision on the petition; and*

*(bb) continuously study, review, or render such a decision during the period the contract is in effect.*

*(N) Dismissal of a petition by backlog procedures shall not affect the review of any subsequent petition for any species*

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3), the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

- (III) notice that such one-year period is being extended under subparagraph (B)(i), or
- (IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or
- (ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—
  - (I) a final regulation to implement such designation, or
  - (II) notice that such one-year period is being extended under such subparagraph.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

- (i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or
- (ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation issued by the Secretary in regard to any emergency posing a sig-

nificant risk to the well-being of any species of fish and wildlife or plants, but only if—

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) LISTS.—(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).

(2) The Secretary shall—

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsection (a) and (b).

(d) PROTECTIVE REGULATIONS.—Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2) in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such, regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State.

(e) SIMILARITY OF APPEARANCE CASES.—The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to section 4 of this Act if he finds that—

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Act.

(f)(1) RECOVERY PLANS.—The Secretary shall develop and implement plans (hereinafter in this subsection referred to as “recovery plans”) for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable—

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan—

(i) a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

(g) MONITORING.—(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c).

(2) The Secretary shall make prompt use of the authority under paragraph 7 of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

(h) AGENCY GUIDELINES.—The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to—

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of the section; and

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

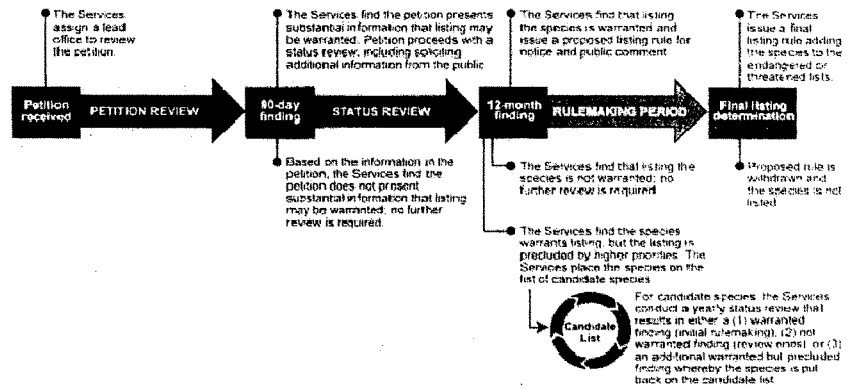
(i) If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3), the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

\* \* \* \* \*



APPENDIX I

**Figure 2: The Process for Issuing Findings on Petitions to List Species as Threatened or Endangered under the Endangered Species Act (ESA)**



Source: (FAC) Analysis of the Endangered Species Act, 1/04/01/17 304

## APPENDIX II

Table 1: Endangered Species Act Section 4 Actions with Statutory Deadlines		
Section 4 Action	Description	Statutory Deadline
<b>Listing and delisting</b>		
90-day finding on a listing or delisting petition	The U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) shall make a finding as to whether the petition presents substantial information that the petitioned action may be warranted.	90-days from receipt of petition (to the maximum extent practicable).
12-month finding on a listing or delisting petition	The Services conduct a status review using best available scientific and commercial data to determine whether the petitioned action is warranted, not warranted, or warranted but precluded by other higher priority listing actions.	12-months from receipt of petition.
Final determination on a proposed rule to list or delist species	When the Services issue a 12-month finding that a petitioned action to list or delist a species is warranted, they are to promptly publish a proposed rule in the <i>Federal Register</i> for notice and comment and to solicit additional information. Then, a determination is made whether to issue a final rule implementing the proposed action, to withdraw the proposed rule, or a notice to extend the review for additional information collection.	1 year from publication of proposed rule. If substantial disagreement exists regarding the sufficiency or accuracy of available data, the deadline may be extended by up to 6 months to obtain additional data.
<b>Critical habitat</b>		
90-day finding on a petition to revise critical habitat	The Services shall make a finding as to whether a petition to revise a critical habitat designation presents substantial information that the requested action may be warranted.	90-days from receipt of petition (to the maximum extent practicable).
12-month finding on a petition to revise critical habitat	If the petition presents substantial information indicating that the requested revision may be warranted, the Services shall issue a notice of how they intend to proceed on the requested revision.	12-months from receipt of petition.
Final determination on a proposed rule to revise critical habitat	If the Services proceed with a proposed rule to revise critical habitat, then they are to publish it in the <i>Federal Register</i> for notice and comment and to solicit additional information. Then, a determination is made whether to issue a final rule implementing the proposed revision, to withdraw the proposed rule, or a notice to extend the review for additional information collection.	1 year from publication of proposed rule. If substantial disagreement exists regarding the sufficiency or accuracy of available data, the deadline may be extended by up to 6 months to obtain additional data.
Critical habitat determination	Critical habitat is to be designated to the maximum extent prudent and determinable concurrently with the final rule to list a species.	Final rule issued within 12-months of proposed rule. If critical habitat is not determinable at the time the species is listed, the designation can be extended for not more than one additional year from issuance of the final listing rule.
<b>5-year status review</b>		
5-year status review	The Services shall conduct a review of all listed species to determine whether any such species should be removed from the list or whether a change should be made in the species' listing status.	At least once every 5 years.

Source: GAO analysis of the Endangered Species Act, | GAO-17-304

## APPENDIX III

Fiscal year	90-day finding on listing petition	12-month finding on listing petition	90-day or 12-month finding on delisting petition	Final listing determination	Critical habitat designation or revision	5-year status review	Total
2005	5	1	0	12	15	194	227
2006	29	4	0	1	1	90	125
2007	0	1	1	0	7	3	12
2008	5	12	1	1	8	1	28
2009	702	6	3	7	1	1	720
2010	155	112	3	10	50	1	331
2011	1	84	2	0	1	6	94
2012	2	20	1	1	0	1	25
2013	2	18	15	0	2	0	37
2014	1	52	1	0	5	0	59
2015	0	13	2	0	0	0	15
<b>Total</b>	<b>902</b>	<b>323</b>	<b>29</b>	<b>32</b>	<b>90</b>	<b>297</b>	<b>1,673</b>

Source: GAO analysis of legal information obtained from the Department of Justice and the federal online database Public Access to Court Electronic Records (PACER). | GAO-17-304

## 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. 6355 weakens the citizen petition process by eliminating statutory deadlines for listing and would allow federal agencies to declare a “petition backlog” if the listing process is overloaded. Currently, federal agencies are required by law to issue decisions on petitions within specific timeframes established in the Endangered Species Act (ESA). The 90-day (for consideration of listing petitions) and 12-month (for making listing determinations) deadlines are critically important to holding federal agencies accountable for enforcing the law in a timely manner consistent with protecting species teetering on the brink of extinction.

This bill creates a process for federal agencies to declare either a 90-day or 12-month “petition backlog” if the number of petitions awaiting a decision exceeds 5% of the number of species that have been subject to petitions in the preceding 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. During a 90-day petition backlog, if the Secretary does not present substantial scientific or commercial information indicating that a species warrants listing, the petition will expire 180 days after the date of submission. During a 12-month petition backlog, the Secretary arbitrarily places petitions into different priority bins. Petition in certain bins would then be automatically suspended if the Secretary does not act upon them within timeframes specified in the bill. This process not only represents an erroneous approach to managing species but would ultimately result in petitions being rejected without further consideration.

The listing petitions found to be unwarranted in both the 90-day and 12-month petition backlogs are not subject to public review or comment. The Secretary must only provide a notice of each finding, and these determinations are precluded from juridical review. Notably, the same conditions do not apply for delisting or downlisting petitions. Furthermore, it is unclear how this legislation would impact the required timelines of the ESA.

The misguided claim that environmental groups purposefully overload the petition process with frivolous requests that force federal agencies to miss the statutory deadlines is unfounded. The primary impediment to timely listings is stagnant agency funding for ESA implementation. Funding and the number of personnel dedicated to the conservation of threatened and endangered species have steadily declined, while costs associated with the listing process continue to grow. This decline is the result of congressional failure to ensure that funding keeps pace with current ESA program

needs, combined with the continued increase in the number of species needing protections.

For these reasons, we strongly oppose this 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.

