

Committee on Natural Resources

Rob Bishop, Chairman
Markup Memorandum

May 11, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff, Subcommittee on Water, Power and Oceans (x58331)

Hearing: **H.R. 3916 (Rep. Ken Calvert, R-CA)**, To amend the Endangered Species Act of 1973 to vest in the Secretary of the Interior functions under that Act with respect to species of fish that spawn in fresh or estuarine waters and migrate to ocean waters, and species of fish that spawn in ocean waters and migrate to fresh waters. **Wednesday, May 16, 2018; 1324 Longworth HOB.**

H.R. 3916 (Rep. Ken Calvert), “*Federally Integrated Species Health Act*” or “*FISH Act*”

Bill Summary

H.R. 3916 (Calvert, CA), the *Federally Integrated Species Health*, or *FISH, Act* is a bipartisan bill that reduces regulatory duplication in enforcement of the Endangered Species Act of 1973 (ESA, 16 U.S.C. 1531 et seq.) pertaining to anadromous and catadromous fish. The bill would vest all ESA authorities for managing these species solely within the Department of the Interior (DOI), eliminating the redundant role of the National Marine Fisheries Service (NMFS). This bill also makes the necessary conforming amendments to clarify that any references in statute or regulation assign these authorities to the Secretary of the Interior. This bill is similar to legislation considered in previous Congresses.

Cosponsors

Jim Costa (D-CA), Doug LaMalfa (R-CA), Tom McClintock (R-CA), Cathy McMorris Rodgers (R-WA), Michael K. Simpson (R-ID), David G. Valadao (R-CA).

Background

The Endangered Species Act of 1973

In response to fears over dwindling populations of plant and animal species, Congress passed the ESA in 1973. ESA sets out the broad goal of conserving and recovering species facing extinction¹. The law authorizes federal agencies to identify imperiled species and list them as either threatened or endangered as appropriate². The law further requires agencies to take necessary actions to conserve those species and their habitats. Congress made its most significant amendments to ESA in 1978, 1982, and 1988; though the overall framework has

¹ [The Endangered Species Act of 1973, 16 U.S.C. §1531\(b\)](#).

² [16 U.S.C. §1533](#).

remained essentially unchanged since its original enactment in 1973.³ In 44 years, there have been 2,335 total listings⁴, and in that time, 42 distinct species have been removed, either entirely or partially throughout their range, due to population recovery out of the 72 total delisted species.⁵

Under the ESA, 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 NMFS is responsible for implementing the ESA with respect to ocean-going fish and some marine mammals.⁶ If federal actions⁷ might affect a listed species, Section 7 of the ESA requires federal agencies that would carry out such actions to consult with FWS or NMFS to “ensure that their actions are ‘not likely to jeopardize the continued existence’ of any endangered or threatened species, nor to adversely modify critical habitat”.⁸

When otherwise lawful actions occurring on private lands that lack a federal nexus result in the incidental take of a listed species, the appropriate Secretary may issue an incidental take permit.⁹ These Section 10 Permits require applicants to submit a conservation plan outlining the impacts of the takings and steps the applicant will take to reduce such impacts along with any alternatives that could avoid such impacts.¹⁰

Regulatory Duplication

FWS or NMFS completes its Section 7 consultation process with the issuance of a Biological Opinion (BiOp) determining whether the federal action will or will not jeopardize the continued existence of the species in question nor adversely modify critical habitat.¹¹ If the BiOp concludes “no jeopardy” then the agency issues an incidental take statement allowing the action to continue.¹² If the BiOp concludes a “jeopardy” determination, then the agency either outlines Reasonable and Prudent Alternative courses of action (RPAs) that will allow the action to move forward without jeopardizing the species.¹³ If no such alternatives exist, the action is not permitted to proceed.

In many cases, federal and private actions impact multiple species that fall under the jurisdiction of both the DOI and the National Oceanic Atmospheric Administration (NOAA). In such instances, both FWS and NMFS issue BiOps detailing impacts on their respective species and detailing RPAs to mitigate jeopardy determinations if necessary. This redundant exercise can

³ [A History of the Endangered Species Act of 1973, United States Fish and Wildlife Service.](#)

⁴ [Listed Species Summary, Environmental Conservation Online System, United States Fish and Wildlife Service.](#)

⁵ [Delisted Species, Environmental Conservation Online System, United States Fish and Wildlife Service.](#)

⁶ [Congressional Research Service Report “The Endangered Species Act: A Primer,” p. 8.](#)

⁷ As defined in [40 CFR 1508.18.](#)

⁸ [Id., p. 18.](#)

⁹ [16 U.S.C. §1539.](#)

¹⁰ [Id.](#)

¹¹ [16 U.S.C. §1536\(b\).](#)

¹² [16 U.S.C. §1536\(b\)\(4\).](#)

¹³ [Id.](#)

result in competing recommendations from different agencies, and in some cases, irreconcilable mandates, such as in the example below.

Examples of agency duplication

In the case of California, operations of the federal Central Valley Project (CVP) and the State Water Project (SWP) in the Sacramento-San Joaquin Bay-Delta (Bay-Delta) required BiOps from FWS and NMFS relating to impacts on the Delta Smelt and certain species of listed salmon species respectively. The 2009 NMFS Biological Opinion for Winter-run Chinook salmon (2009 BiOp) requires the Bureau of Reclamation (Reclamation) to receive concurrence from NMFS prior to issuing water supply allocations for the water year.¹⁴ On March 31, 2016, after reviewing Reclamation's March forecast and water supply allocation, NMFS sent a concurrence letter stating: "NMFS concurs with Reclamation's forecast based on March 15, 2016, hydrologic conditions, and initial water supply allocation, that RPA I.2.3.A should be implemented this year."¹⁵ Two weeks after sending its concurrence letter, NMFS indicated that its temperature projections were no longer valid. As a result, NMFS proposed to limit releases from Shasta Dam to 8,000 cubic feet per second (cfs) – down from a maximum of 10,500 cfs in the approved operations plan – through the summer and into the fall in order to preserve cold water for Winter-run Chinook salmon.¹⁶

As NMFS sought to limit Delta outflow, FWS proposed to *increase* Bay-Delta outflow for the Delta smelt during the same period. According to a Reclamation spokesman, FWS requested up to 300,000 acre-feet of water for Delta outflow for the Delta smelt this summer.¹⁷ Some contend that these actions are outside the requirements of the 2008 FWS Delta Smelt Biological Opinion (2008 BiOp).¹⁸ At a July 2016 Subcommittee on Water, Power and Oceans hearing, Mr. Ara Azhderian, Water Policy Administrator for the San Luis & Delta-Mendota Water Authority, testified: "The current BiOps have squeezed virtually all of the operational flexibility from the Projects, causing the damaging effects of the natural drought to amplify the chronic water supply shortages of the regulatory drought, with devastating effect throughout the CVP service area, but especially in the San Joaquin Valley".¹⁹

¹⁴ [Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project, Southwest Region, National Marine Fisheries Service, June 4, 2009, p. 602.](#)

¹⁵ http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/nmfs_march_31_2016_response_to_the_bureau_of_reclamation_s_march_forecast.pdf, p. 4

¹⁶ http://valadao.house.gov/uploadedfiles/june_2016_letter_to_u.s._interior_and_u.s._commerce.pdf, p. 1

¹⁷ <http://www.sacbee.com/news/state/california/water-and-drought/article86742377.html>

¹⁸ http://valadao.house.gov/uploadedfiles/june_2016_letter_to_u.s._interior_and_u.s._commerce.pdf, p. 2

¹⁹ [Written Testimony of Mr. Ara Azhderian before the Subcommittee on Water, Power and Oceans, Oversight Hearing "Changing Demands and Water Supply Uncertainty in California", July 12, 2016, p. 2.](#)

Section 10 permit applicants face similar uncertainty when their actions impact species that cross jurisdictional lines. An example would be ESA listing of several species including the northern spotted owl and the marbled murrelet that stalled timber management activities in the Pacific Northwest. Revenues from timber sales in the Pacific Northwest finance a variety of county services, including public schools.²⁰ Section 10 of ESA requires non-federal stakeholders to develop habitat conservation plans (HCPs) for spotted owls and marbled murrelets in order to continue timber harvesting in ways that would mitigate impacts on these species.²¹ However, a 2007 guidance from FWS and NMFS regional offices overseeing California, Nevada and the Pacific Northwest, complicated the HCP development and Section 10 application processes.²² According to the guidance, each Service will consider only multi-species HCPs that also encompass potential impacts on species under the jurisdiction of both Services if the lands in question may support any such species. Furthermore, the guidance established that applicants pursue “parallel permit processes as a criterion for permit issuance,” effectively establishing a firewall between the Services’ individual ESA determinations.²³



Figure 1: Maps of NMFS (top) and FWS (bottom) regions. FWS Regions 1 and 8 issued the 2007 guidance jointly with NMFS Northwest and Southwest Regions.

In Oregon, for example, FWS refuses to issue Section 10 permits to forestland owners for the marbled murrelet and spotted owl unless the applicants also undertake the conservation measures required to obtain a Section 10 permit from NMFS for Oregon coast coho.²⁴ All three species are listed as threatened.

²⁰ [“Public Timber: Federal and State Programs Differ Significantly in Pacific Northwest”, Report to the Chairman, Committee on Resources, House of Representatives, U.S. Government Accountability Office, May 1996, p. 1.](#)

²¹ “OFIC Comments on Streamlining Regulatory Processes and Reducing Regulatory Burden”, Letter from the Oregon Forest & Industries Council to the National Marine Fisheries Service, August 21, 2017, p. 2.

²² “Guidance on Single-Species and Single-Agency Approaches to Endangered Species Act Section 10 Permits for Habitat Conservation Plans, Safe Harbor Agreements, and Candidate Conservation Agreement with Assurances”, Joint Memorandum, National Marine Fisheries Service and United States Fish and Wildlife Service; July 11, 2007.

²³ Id., p. 2.

²⁴ “OFIC Comments on Streamlining Regulatory Processes and Reducing Regulatory Burden”, Letter from the Oregon Forest & Industries Council to the National Marine Fisheries Service, August 21, 2017, p. 2.

The different approach each Service takes to Section 4(d) rules creates further uncertainty for those attempting to navigate the interjurisdictional regulatory web. While the ESA applies a blanket prohibition on takings of endangered species²⁵, this prohibition does not extend to threatened species. Section 4(d) authorizes each Service to promulgate regulations “the Secretary... deems necessary and advisable to provide for the conservation of [threatened] species”.²⁶ NMFS applies 4(d) rules to threatened species in its jurisdiction on a case-by-case basis, whereas FWS uses its 4(d) authority to extend a blanket taking prohibition to all threatened species in its jurisdiction and in some instances applies tailored rules to individual threatened species.²⁷ When the ESA requires both Services to participate in a Section 7 consultation or to issue a Section 10 permit, these differing regulatory styles add unnecessary hurdles to an already extensive review process.

H.R. 3916 – The FISH Act

In 1966 Congress passed the Marine Resources and Engineering Development Act (P.L. 89-454), which established a Commission on Marine Science, Engineering and Resources. The legislation directed the Commission to “make a comprehensive investigation and study of all aspects of marine science in order to recommend an overall plan for an adequate national oceanographic program that will meet the present and future national needs”.²⁸ The Commission published its final report “Our Nation and the Sea: A Plan for National Action” which laid the foundation for creation of NOAA.²⁹ President Nixon incorporated the Commission’s recommendation into his Advisory Council on Executive Organization which recommended that this new agency be housed in DOI.³⁰ Nearly two-thirds of this new agency’s budget would be comprised of subsuming the Environmental Science Services Administration (ESSA) which operated within the Department of Commerce. Citing the prevalence of ESSA’s resources in the new budget for NOAA, then-Secretary of Commerce Maurice Stans – possibly aided by political strife between President Nixon and his DOI Secretary – successfully argued that NOAA should be temporarily housed in the Department of Commerce.³¹ On October 3, 1970 President Nixon created NOAA as part of Reorganization Plan No. 4.³²

In his 2011 State of the Union address, President Obama highlighted this duplicative authority as his “favorite example” of government inefficiency, saying “the Interior Department is in charge of salmon while they're in freshwater, but the Commerce Department handles them when they're in saltwater. And I hear it gets even more complicated once they're smoked”.³³

²⁵ [16 U.S.C. §1538\(a\)](#).

²⁶ [16 U.S.C. §1533\(d\)](#).

²⁷ Curtiss, Sarah Stauffer, “A Necessary Tool for Conservation: The Case for Section 4(d) of the Endangered Species Act: Current & Emerging Issues Affecting Resource Development”, Paper 7C, Page No. 2 (Rocky Mt. Min. L. Fdn. 2015).

²⁸ [80 Stat 206](#).

²⁹ [A History of NOAA, National Oceanic and Atmospheric Administration](#).

³⁰ [Id.](#)

³¹ [Id.](#)

³² [84 Stat. 2090-3](#).

³³ State of the Union Address, President Barack Obama, 2011.

Furthermore, President Obama formally proposed the idea of merging NOAA into DOI in 2012 in his FY 2013 budget request and echoed the 2012 proposal in his FY 2016 budget request.^{34 35}

The *FISH Act*, authored by Rep. Ken Calvert (R-CA), takes a step in righting a decades-old wrong. H.R. 3916 would eliminate bureaucratic redundancies by consolidating the ESA functions of NOAA and DOI relating to the conservation of anadromous and catadromous fish, making DOI solely responsible for managing these species. This legislation will allow one wildlife management agency to comprehensively evaluate impacts on species interacting in a shared ecosystem and determine a holistic management approach.

Major Provisions/Section-by-Section Analysis of H.R. 3916

Section 2 transfers all ESA authority with respect to the conservation of anadromous and catadromous fish species from NOAA to DOI. Section 2 amends Section 3 of the Endangered Species Act to reflect this change.

Section 3 ensures any reference in federal law, executive order, rule, regulation, or delegation of authority, or any document of or pertaining to a department or office from which a function is transferred by the *FISH Act* would refer to the Secretary and/or DOI upon passage. Section 3 also guarantees the *FISH Act* would impose no limitations on the Secretary of the Interior's authorities under the ESA.

Section 3 also includes a number of savings clauses. The legislation would not interfere with existing rules, contracts, licenses, etc. or any court proceedings that had initiated prior to the date of enactment. If any official is party to a lawsuit in his/her official capacity relating to authorities transferred under this legislation, the lawsuit is allowed to proceed substituting the analogous officer within DOI. Section 3 also ensures compliance with all procedural and judicial review requirements with respect to exercise of transferred authorities by the Secretary of the Interior.

Section 4 defines several key terms including “anadromous species” and “catadromous species”.

Cost

The Congressional Budget Office has yet completed a cost estimate of this bill.

Administration Position

Unknown.

Effect on Current Law (Ramseyer)

Showing Current Law as Amended by H.R. 3916

³⁴ [Fiscal Year 2013 Budget of the United States, p. 41.](#)

³⁵ [Fiscal Year 2016 Budget of the United States, p. 81.](#)

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

§1532. Definitions

For the purposes of this chapter-

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(15)(A) 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 chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(B) Notwithstanding subparagraph (A), with respect to anadromous species and catadromous species, the term "Secretary" means the Secretary of the Interior.

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(22) The term "anadromous species" means a species of fish that spawn in fresh or estuarine waters and that migrate to ocean waters.

(23) The term "catadromous species" means a species of fish that spawn in ocean waters and migrate to fresh waters.