

Committee on Natural Resources

Rob Bishop, Chairman
Markup Memorandum

September 25, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff — Melissa Beaumont (x5-7107)

Markup: **H.R. 6345 (Rep. Steve Pearce)**, To provide for greater county and State consultation with regard to petitions under the Endangered Species Act of 1973, and for other purposes.
September 27, 2018, 10:15 a.m.; 1324 Longworth House Office Building.

H.R. 6345 (Rep. Steve Pearce), “Ensuring Meaningful Petition Outreach While Enhancing Rights of States Act of 2018” or the “EMPOWERS Act”

Summary of the Bill

H.R. 6345, the “EMPOWERS Act,” introduced by Rep. Steve Pearce (R-AZ-02) on July 12, 2018, amends the Endangered Species Act (ESA) to give States and local governments the ability to provide meaningful feedback and information concerning major ESA decisions that affect their communities. The ESA currently provides opportunities for States to provide input, but imposes no special requirement to consult with States. This bill ameliorates this omission by requiring federal agencies to consult with States before making decisions on ESA petitions and to provide an explanation when their decisions diverge from the findings or advice of States.

Cosponsors

[31 Cosponsors](#)

Background

The Endangered Species Act of 1973

The Endangered Species Act of 1973 (ESA, 16 U.S.C. 1531 et seq.) sets out the broad goal of conserving and recovering species facing extinction. The law authorizes federal agencies to identify imperiled species and list them as either threatened or endangered as appropriate.¹ The law further requires agencies to take necessary actions to conserve those species and their habitats.² The Secretary of the Interior, through the U.S. Fish and Wildlife Service (FWS), has responsibility for plants, wildlife and inland fisheries. The Secretary of Commerce, through the National Marine Fisheries Service (NMFS) is responsible for implementing the ESA with respect to ocean-going fish and some marine mammals.³ Congress made its most significant amendments to ESA in 1978,

¹ 16 U.S.C. 1533.

² *Id.*

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

1982, and 1988, although the overall framework has remained essentially unchanged since its original enactment in 1973.⁴

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.⁵ In fact, many of those species were delisted after it was discovered that federal agencies used erroneous data in the original listing.⁶ In total, to date there have been 2,421 listings⁷ under the ESA. In that time the Secretaries have delisted 77 species, but only 47 distinct species have been removed, either entirely or partially throughout their range, due to population recovery.⁸

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

In many cases, implementation of the ESA has caused increased burdens for those living in close proximity to the protected species.¹¹ Often States and local communities have the most knowledge about the species located in their State and can bring the greatest amount of resources to conservation efforts.¹² They are eager to stabilize species populations to prevent listings that can have a major negative economic impact on State and local communities through restrictions on land use.¹³ Yet, too often, federal management of threatened and endangered species fails to take

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

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

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

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

⁸ *Supra*, note 6.

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

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

¹¹ *Supra*, note 9.

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

¹³ *Id.*

advantage of the wealth of knowledge of State and local officials and of the successful conservation measures implemented by States.¹⁴

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

H.R. 6345

Determinations under the ESA require FWS and NMFS to collect extensive amounts of data and information to analyze the status of a species and to decide whether a listing is necessary for conservation and survival of the species.¹⁶ Notice and comment periods provide one mechanism for such information to be collected,¹⁷ but more needs to be done to ensure that valuable information from States, counties, and local governments are solicited and considered in ESA decision-making.

States and counties where species reside often have some of the most specialized knowledge about the threats facing species and local conservation measures in place to counter such threats and to ensure the survival of the species. Many States have already proven the value of their input in the ESA decision-making process. For example, in Texas, the Comptroller's Office is responsible for administering approximately \$15 million to fund research on little-known species under consideration for ESA listing.¹⁸ The State utilizes public universities to conduct research on these species to ensure federal agencies have the most compete and reliable information before making decisions that affect private property owners and local economies in the State.¹⁹ Programs such as these highlight the unique perspective States can provide to federal agencies through expert data, as well as through the infrastructure and relationships they have in place with landowners, communities, and industries.

While many States, such as Texas, are willing to offer these resources to federal agencies during the ESA decision-making process, federal agencies often neglect to utilize these key local resources available to them. This unfortunately was the case for some local stakeholders during the decision-making process for determining the listing status of the greater sage grouse; they felt the Department of the Interior was not taking local conservation plans and data into consideration

¹⁴ 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/editor/LTR_GSG_Rollup_Mtgs_FINAL.pdf.

¹⁵ 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>.

¹⁶ 16 U.S.C. §1533.

¹⁷ *Id.*

¹⁸ *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 Glen Hegar, Texas Comptroller of Public Accounts) available at https://naturalresources.house.gov/uploadedfiles/testimony_hegar.pdf

¹⁹ *Id.*

at the time.²⁰ Key stakeholders, such as the States involved in conservation of the greater sage grouse, have essential input that federal agencies should be required to factor into the determination process for species listings.

H.R. 6345, the EMPOWERS Act, works to avoid these conflicts between federal agencies and States by requiring that States receive advanced notice of any potential listing decisions on species that impact their State, and gives them the right to provide advice and information to federal agencies concerning the potential listing. The bill also increases transparency through the prerequisite that federal agencies provide written explanations and relevant information when their decisions differ from those of States. Increasing meaningful cooperation and counsel of States impacted by species decisions in this manner will only improve the way species are conserved and recovered under the ESA.

Major Provisions/Analysis of H.R. 6345

Section 1. Short Title. The bill may be referred to as the “Ensuring Meaningful Petition Outreach While Enhancing Rights of States Act of 2018” or the “EMPOWERS Act of 2018”.

Section 2. Greater County and State Involvement.

Section (a) County and State Consultation on Petitions. Amends Section 4(b)(3) of the ESA by requiring petitioners under the ESA to provide a 30-day notice of intent before submitting a petition to list, delist, reclassify a species or to revise critical habitat in the U.S. to the chief executive of each county and State where the species is located.

If a petitioned action may be warranted, the Secretary shall request information from the chief executive of each county and State concerning threats to the species, local efforts to protect the species, anticipated effects of the petition’s actions within the area, and advice on whether the petition is warranted based on the status of the species. The Secretary may also verify information presented in a petition using field testing.

If the chief executive advises that the petitioned action is not warranted, the Secretary may not proceed with the action unless the Secretary demonstrates the information presented by the chief executive is incorrect and the action is warranted.

Section (b) Regulations to Implement Determinations. Section (b) amends section 4(b)(5) of the ESA to require that 90 days before a regulation goes into effect, the Secretary must provide notice to each chief executive of each county and State where the species is located and request a determination whether the proposed regulation is warranted. If the chief executive does not agree with the determination, the Secretary must provide the reasons in writing for the determination and the information available to support that determination.

²⁰ *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources, 113th Cong. (2013)* (written testimony of Tom Jankovsky, Garfield County, Colorado), available at <https://naturalresources.house.gov/uploadedfiles/jankovskytestimony06-04-13.pdf>.

Section (c) Consultation on Final Determination. Section (c) amends section 4(i) of the ESA to ensure that if the final determination on a regulation conflicts with the advice of a county or State, the Secretary must provide written justification that includes any information regarding the determination and comments that disagreed with the regulation.

Cost

The Congressional Budget Office has not completed a cost estimate of this bill at this time.

Administration Position

Unknown.

Anticipated Amendments

Unknown.

Effect on Current Law (Ramseyer)

Showing Current Law as Amended by H.R. 6345

[new text highlighted in yellow; text to be deleted bracketed and highlighted in blue]

Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)

Section 4 (16 U.S.C. 1533)

§1533. Determination 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 taking 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](#), 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 this chapter 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) 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 ¹ 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](#), 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) LISTING PETITION REVIEW REQUIREMENTS-

(i) Not later than 30 days before submitting to the Secretary a petition to list, delist, or reclassify a species that occurs in the United States, or to revise a designation of critical habitat of such a species, the petitioner shall provide to the chief executive of each county and State in which the species is located a notice of intent to submit such petition.

(ii) The Secretary shall, upon finding that a petitioned action to list a species as a threatened species or endangered species may be warranted, solicit from the chief executive of each county and State in which the species is located—

(I) information regarding threats to the species and efforts by the county or State, respectively, to protect the species;

(II) information about the anticipated effects of the action requested in the petition in that county or State, respectively; and

(III) the advice of the chief executive on whether the status of the species merits the action requested in the petition, including information in support of such advice.

(iii) The Secretary may verify by field testing the information presented in a petition asserting that a species is a threatened species or endangered species.

(iv) If a chief executive advises under clause (ii)(III) that the petitioned-for action is not warranted, the Secretary may not proceed with the action unless the Secretary demonstrates that information submitted in support of such advice by the chief executive is incorrect and that the action is warranted.

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

[(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.]

(5) NOTICE REQUIRED- With respect to any regulation proposed by the Secretary to implement a determination referred to in subsection (a)(1), 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;
 - (ii) provide notice of the proposed regulation (including the complete text of the regulation) to the chief executive of county and State in which the species is located, and invite such chief executive to submit to the Secretary a determination as to whether the proposed regulation is warranted; and
 - (iii) if the chief executive notifies the Secretary that the proposed regulation is not warranted, provide to the chief executive a record of decision for such determination, including information made available to the Secretary that did not support the determination and in writing the reasons for the determination;
- (B) in cooperation with the Secretary of State, provide notice of the proposed regulation to each foreign nation in which the species is located or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;
- (C) provide notice of the proposed regulation to--
- (i) each person who requests such notice;
 - (ii) each person who has submitted additional data on the proposed regulation;
 - (iii) each county, State, and local government within the jurisdiction of which the species is located or that is likely to experience any effects of any measures to protect the species under this Act; and
 - (iv) such professional scientific organizations as the Secretary considers appropriate;
- (D) publish a summary of the proposed regulation on the internet; 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.

* * * *

(9) FACA- Consultation with counties and States regarding petitions and proposed regulations under this subsection shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

* * * * *

[(i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition

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.]

(i) Written Justification- If the Secretary adopts a final regulation in conflict with advise submitted by the chief executive of a county or State or fails to adopt a regulation pursuant to an action petitioned for by such a chief executive under subsection (b)(3), the Secretary shall submit to the chief executive--

(1) a separate written justification explaining the failure of the Secretary to adopt regulations consistent with the advise or petition of the chief executive;

(2) any determination referred to in subsection (a)(1) relating to the regulation;
and

(3) all comments received by the Secretary that disagreed with all or part of the regulation.