

Committee on Natural Resources

Rob Bishop, Chairman
Markup Memorandum

September 25, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff — John Strom (x57107)

Markup: **H.R. 6346 (Rep. Mike Johnson)**, to amend the Endangered Species Act of 1973 to provide for consideration of the totality of conservation measures in determining the impact of proposed Federal agency action.
September 27, 2018, 10:15 a.m.; 1324 Longworth House Office Building.

H.R. 6346 (Rep. Mike Johnson), “Weigh Habitats Offsetting Locational Effects Act of 2018” or the “WHOLE Act of 2018”

Bill Summary

H.R. 6346, the Weigh Habitats Offsetting Locational Effects, or “the WHOLE Act,” is a bipartisan bill that requires that the totality of conservation measures and planned conservation measures be considered before taking federal actions that impact species. This legislation will reduce costs associated with consultation, allow important projects to move forward while safeguarding listed species, and incentivize private conservation efforts to benefit endangered and threatened species.

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 appropriate¹. 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 economic impact on State and local communities through restrictions on land use.¹³ Yet, too often federal management of threatened and endangered species fails to take advantage

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.*

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. 6346

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

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

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

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

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

¹⁹ *Id.*

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

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

Major Provisions of H.R. 6346

Section 2. Consideration of the Totality of Conservation Measures. This section requires the relevant Secretary, when determining whether a federal agency action is likely to jeopardize a listed species or result in the destruction or adverse modification of critical habitat, to consider the offsetting effects of all avoidance, minimization, and other species protection or conservation measures that are already in place or proposed to be implemented as part of the action. This includes the development, improvement, protection, or management of species habitat whether it is designated as critical habitat of the affected species.

Cost

The Congressional Budget Office is yet to complete a cost estimate of this bill.

Administration Position

Unknown.

Anticipated Amendments

Unknown.

Effect on Current Law (Ramseyer)

Showing Current Law as Amended by H.R. 6346

[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 7 (16 U.S.C. 1536)

§1536. Interagency cooperation

* * * * *

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to

²¹ 50 CFR § 402.14.

subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

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

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

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

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

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

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

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

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

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

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

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

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