

# Committee on Natural Resources

Rob Bishop, Chairman  
Hearing Memorandum

July 17, 2017

To: All Natural Resources Committee Members

From: Majority Committee Staff — Megan Olmstead  
Subcommittee on Oversight and Investigations (x5-7107)

Hearing: Legislative hearing on **H.R. 1274 (Rep. Dan Newhouse)**, To amend the Endangered Species Act of 1973 to require making available to States affected by determinations that species are endangered species or threatened species all data that is the basis of such determinations, and for other purposes.  
**July 19, 2017 at 10:00 a.m. in 1324 Longworth House Office Building.**

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**H.R. 1274 (Rep. Dan Newhouse), “*State, Tribal, and Local Species Transparency Act*”**

## **Summary of the Bill**

H.R. 1274, introduced by Rep. Dan Newhouse (R-WA-04) on March 1, 2017, amends the Endangered Species Act to require the availability of data used as a basis for listing and critical habitat determinations to the impacted States.

It also ensures to include data submitted by State, local, tribal or county governments as part of the ESA’s requirement of the Secretary to use the best available scientific and commercial data when reviewing the status of the species. This legislation is identical to a provision of H.R. 4315 that passed the House in the 113<sup>th</sup> Congress with bipartisan support. This bill will be considered along with four other bills.

## **Cosponsors**

Rep. Ralph Lee Abraham (R-LA), Rep. Kevin Cramer (R-ND), Rep. Bob Goodlatte (R-VA), Rep. Paul Gosar (R-AZ), Rep. Gregg Harper (R-MS), Rep. Walter Jones (R-NC), Rep. Roger Marshall (R-KS), Rep. Stevan Pearce (R-NM), Rep. Scott Tipton (R-CO), Rep. Ted Yoho (R-FL).

## **Invited Witnesses**

### **Panel I**

*The Honorable Dan Newhouse*  
Member of Congress  
Washington’s 4<sup>th</sup> Congressional District

**Panel II (in alphabetical order)**

*Mr. Jeff Corwin*

Biologist

Host of ABC's *Ocean Treks with Jeff Corwin*

Marshfield, MA

*The Honorable Glenn Hegar*

Comptroller of Public Accounts

State of Texas

Austin, Texas

*Mr. Kent Holsinger*

Manager

Holsinger Law, LLC

Denver, Colorado

*Mr. Greg Sheehan*

Deputy Director

U.S. Fish and Wildlife Service

Washington, DC

*Mr. David Willms*

Policy Advisor for Governor Matt Mead

Cheyenne, Wyoming

**Background**

Section 6 of the Endangered Species Act (ESA) requires federal cooperation with the States “to the maximum extent practicable” in listing decisions, that the federal agencies often duplicate analyses and conservation plans already generated by states, and that data provided by the states is sometimes ignored by the federal agencies in ESA activities.<sup>1</sup> Species listings and critical habitat designations have the potential to impact entire communities, industries, and can place burdens upon state governments. States, tribes, and county governments are well-situated to participate in listing decisions in a meaningful and productive manner. However, in practice, federal cooperation with States, tribes, and local governments does not always occur.

States have testified that the ESA as currently implemented, does not properly honor their ability to participate to the maximum extent practicable in federal ESA listing decisions. States

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<sup>1</sup> Endangered Species Act of 1973, 16 U.S.C. § 1531 (1973).

also have stated that they are not made privy to factors utilized by the federal government in listing decisions that impact lands, communities, and species within their borders.<sup>2</sup>

States are the species managers prior to a listing decision by the federal government and will become the managers of the species after a delisting decision by the federal government. States possess extensive, on-the-ground experience and expertise in science-based wildlife management principles, generation of applicable data, and the application of public policy in managing wildlife as a public asset.<sup>3</sup>

In spite of the expertise and willingness of State, local, and tribal governments to participate in the ESA process, the Department of the Interior and the Department of Commerce are not required to disclose scientific information or the basis they used in making listing or critical habitat decisions to the states or to utilize scientific data generated by the states, even though states often have actual data that the federal agencies do not.<sup>4</sup>

Local county governments, particularly those in areas with a significant portion of federally owned lands within their jurisdictional borders, have expressed concerns that federal ESA-implementing agencies often ignore locally generated science and data provided by them to the federal agencies in listing decisions.<sup>5</sup> In more than one case, a court order has been required to obtain the data from federal officials, even though the data was obtained through taxpayer-

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<sup>2</sup> See, *The Status of the Federal Government's Management of Wolves: Hearing Before the H. Comm. on Natural Resources*, 114th Cong. (2016) (States were not included in decisions to introduce and manage wolf populations in the Southwest, Mid-Atlantic, West, and Great Lakes regions. Faulty science and implementation caused failure of Red Wolf program in North Carolina). See also, Letter from John Hickenlooper and Matt Mead, Governors of Colorado and Wyoming, Western Governors Association, to Steve Ellis, Deputy Director of Operations, Bureau of Land Management and Ms. Leslie Weldon, Deputy Chief, National Forest System (Sept. 29, 2014) available at [http://westgov.org/images/editor/LTR\\_GSG\\_Rollup\\_Mtgs\\_FINAL.pdf](http://westgov.org/images/editor/LTR_GSG_Rollup_Mtgs_FINAL.pdf) (BLM and Forest Service did not coordinate with states on greater sage grouse conservation). See also, 50 C.F.R. 424 (2016) (FWS and NOAA issued rule in 2016 expanding the definition of critical habitat to include areas in which species presence or habitats are ephemeral in nature, or species presence is difficult to establish through surveys. In effect, the rule dismissed the need for critical habitat designations based on science, and widened possible critical habitat designations to areas in which the species may never be located, areas in which it may have never been located historically, and areas that are not essential to species survival). See also, Andrea Wortzel and Angela Levin, *States Challenge Critical Habitat Rules Under Endangered Species Act*, ENVIRONMENTAL LAW AND POLICY.COM (Dec. 28, 2016), <http://www.environmentallawandpolicy.com/2016/12/states-challenge-critical-habitat-rules-endangered-species-act/> (Eighteen states filed suit challenging an Obama Administration rule that expanded the Services' authority to designate critical habitat areas that are not occupied by threatened or endangered species without scientifically supporting that such areas are essential to the conservation or recovery of an endangered or threatened species).

<sup>3</sup> See, H.B. 1025, 83rd Legislature (TX 2009) (The Texas Legislature provided \$5 million to the Texas Comptroller's Office to support high-quality species research through state-funded universities and continues to provide funding. This has kept species, such as the Dunes Sagebrush Lizard, off of the Endangered Species List). <https://comptroller.texas.gov/programs/species-economy/>. See also, Letter from Glenn Hegar, Comptroller, State of Texas to the People of Texas (2017) available at <https://comptroller.texas.gov/programs/species-economy/letter.php>.

<sup>4</sup> See, Western Energy Alliance, *Environmental Groups Keep Suing Despite Vast ESA Settlement Agreements* (July 13, 2017), <https://www.westernenergyalliance.org/knowledge-center/legal/sue-and-settle> (FWS settled agreements behind closed doors with WildEarth Guardians and the Center for Biological Diversity on a combined 878 species in 2011 and the scientific information utilized in the settlement listing decisions was not made available to the States).

<sup>5</sup> *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, at 39), which describes Garfield County, Colorado's questioned the accuracy of a map developed by the FWS for sage grouse habitat in Colorado after the federal agency refused its request to verify data used by the U.S. Fish and Wildlife Service federal report.

funded studies.<sup>6</sup> In addition, local entities have raised the concern that a key document used by the FWS in its listing determination was an unpublished manuscript that was inaccessible for public review.<sup>7</sup>

Tribal governments also play a significant role in species conservation and recovery activities and some have raised concerns that tribal data and science are not being factored into ESA listing decisions. For example, in the Columbia and Snake Rivers, where thirteen populations of salmon are listed under the ESA, tribal hatchery managers have successfully utilized hatchery supplementation to enhance salmon and steelhead recovery for several years. The Snake River fall chinook run has rebounded to record near-record levels due in large part to the tribal hatchery programs.<sup>8</sup> Though a federal court ordered the NMFS in 2001 to consider hatchery salmon in populations proposed for ESA listing, the agency issued a revised policy that emphasized the “negative impacts” of hatchery fish on naturally spawning fish, but ignored tribal scientific data highlighting the positive benefits that hatchery fish are having on recovering salmon in the Northwest.<sup>9</sup>

H.R. 1274 would simply require the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to be transparent in their use of data for ESA listing decisions, both with regard to their section 6 responsibilities with states and respecting use of valuable state, local and tribal data to guide listing determinations that affect them and their citizens. It ensures that states are afforded every opportunity to provide input on laws, regulations, and policies related to the implementation of the ESA before such laws, regulations, and policies are final. This bill also would ensure that the best scientific and commercial data available for ESA listing decisions includes data from those closest to the ground and most impacted by the listings – the states, local governments, and tribes.<sup>10</sup>

#### *Previous Committee and House Activity and Legislation*

On September 21, 2016, the Subcommittee on Oversight and Investigations held a hearing on the federal government’s management of wolves. Witnesses testified on behalf of the

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<sup>6</sup> [Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources, 113th Cong. \(2013\) \(testimony of Dr. Ramey, at 27\).](#)

<sup>7</sup> Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources, 113th Cong. (2013) (testimony of Kent McMullen, Franklin County Natural Resources Advisory Committee, at 21).

<sup>8</sup> [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. \(2013\) \(written testimony of N. Kathryn Brigham, Columbia River Inter-Tribal Fish Commission, at 17\).](#)

<sup>9</sup> [Trout Unlimited v. Lohn, 559 F.3d 946 \(9<sup>th</sup> Cir. 2009\); 70 Fed. Reg. 37, 204.](#)

<sup>10</sup> John Stroud, Garfield County Protests Sage Grouse Protection Plan, THE ASPEN TIMES, July 8, 2015 at <http://www.aspentimes.com/news/garfield-county-protests-sage-grouse-protection-plan/> (Garfield County, Co challenged the Northwest Colorado Greater Sage-Grouse management plan on the basis that the plan fails to recognize habitat differences in that portion of Colorado, designating critical habitat where the birds are unable to live. It also challenges the federal failure to take local and state habitat conservation plans into consideration) and Garfield County, CO, Comments on the BLM’s NW Colorado Greater Sage Grouse Draft Resource Management Plan and Final Environmental Impact Statement (May 13, 2015) at <https://www.garfield-county.com/community-development/sage-grouse-resource-management.aspx>.

States of Idaho, New Mexico, and North Carolina about the failure of the federal government to involve States in federal ESA processes for Mexican Wolves, Gray Wolves, and Red Wolves.<sup>11</sup>

On March 28, 2017, the Subcommittee on Oversight and Investigations held a hearing on the federal government's failure to adhere to ESA consultation deadlines. Witnesses testified about federal refusal to consider State-generated science and the impact such failures have upon projects and communities.<sup>12</sup>

Additionally, the Subcommittee on Oversight and Investigations held a hearing on June 28, 2017 about the effects of excessive environmental litigation. The hearing examined the negative impact of closed-door "mega settlements" on state and local communities.<sup>13</sup>

Rep. Randy Neugebauer (R-TX), introduced H.R. 4317, an identical version of this bill in the 113th Congress and the Committee examined it at an April 8, 2014 legislative hearing.<sup>14</sup> On April 30, 2014, the Committee ordered it favorably reported to the House,<sup>15</sup> and on July 29, 2014, this bill was included as section 3 of H.R. 4315, which passed the House by a bipartisan vote of 233-190.

### **Cost**

No current CBO score is available. However, in 2014, CBO found that an identical bill, H.R. 4317 in the 113th Congress, would have no significant impact upon the federal budget, nor would it affect direct spending or revenues.

### **Administration Position**

No current Administration position is available.

### **Section-by-Section Analysis of H.R. 1274**

**Section 1.** *Short Title.* The bill may be referred to as the State, Tribal, and Local Species Transparency and Recovery Act.

**Section 2.** *Decisional Transparency and Use of State, Tribal, and Local Information*

*Section (a) Requiring Decisional Transparency with Affected States.* Section (a) Amends Section 6 of the ESA to require decisional transparency with the states by requiring the Secretary to provide all data used in listing determinations to affected states.

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<sup>11</sup> *The Status of the Federal Government's Management of Wolves: Hearing Before the H. Comm. on Natural Resources Subcomm. on Oversight and Investigations*, 114th Cong. (2016).

<sup>12</sup> *Oversight Hearing on ESA Consultation Impediments to Economic and Infrastructure Development: Hearing Before the H. Comm. on Natural Resources Subcomm. on Oversight and Investigations*, 115th Cong. (2017).

<sup>13</sup> *Examining Policy Impacts of Excessive Litigation Against the Department of the Interior: Hearing Before the H. Comm. on Natural Resources Subcomm. on Oversight and Investigations*, 115th Cong. (2017).

<sup>14</sup> H.R. 2352, 114th Cong. (2015), and *Hearing on H.R. 4315, H.R. 4316, H.R. 4317, and H.R. 4318 before the House Comm. on Natural Resources*, 113th Cong. (2014).

<sup>15</sup> *Markup on H.R. 4315, H.R. 4316, H.R. 4317, and H.R. 4318 Before the House Comm. on Natural Resources*, 113th Cong. (2014).

*Section (b) Ensuring Use of State, Tribal, and Local Information.* Section (b) ensures that U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) use of State, tribal, and local information in listing decisions by clarifying that the term “best scientific and commercial data” includes all such data submitted by a State, tribal, or county government.

### **Effect on Current Law (Ramseyer)**

#### **Showing Current Law as Amended by H.R. 1274**

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

### **Section 6(a) of the Endangered Species Act of 1973 (16 U.S.C. 1535(a))**

#### **§1535. Cooperation with States**

##### **(a) Generally**

(1) In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. [Such cooperation shall include] (2) Such cooperation shall include—

(A) before making a determination under section 4(a), providing to States affected by such determination all data that is the basis of the determination; and

(B) consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

##### **(b) Management agreements**

The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 715s of this title.

##### **(c) Cooperative agreements**

(1) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program-

(A) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy

of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened; or  
that under the State program-

(i) the requirements set forth in subparagraphs (C), (D), and (E) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to [section 1533\(d\) of this title](#) or [section 1538\(a\)\(1\) of this title](#) with respect to the taking of any resident endangered or threatened species.

(2) In furtherance of the purposes of this chapter the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program-

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or

that under the State program-

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 1533(d) or section 1538(a)(1) of this title with respect to the taking of any resident endangered or threatened species.

**(d) Allocation of funds**

(1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered and threatened species or to assist in monitoring the status of candidate species pursuant to subparagraph (C) of section 1533(b)(3) of this title and recovered species pursuant to section 1533(g) of this title. The Secretary shall allocate each annual appropriation made in accordance with the provisions of subsection (i) of this section to such States based on consideration of-

(A) the international commitments of the United States to protect endangered species or threatened species;

(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this chapter;

(C) the number of endangered species and threatened species within a State;

(D) the potential for restoring endangered species and threatened species within a State;

(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species;

(F) the importance of monitoring the status of candidate species within a State to prevent a significant risk to the well being of any such species; and

(G) the importance of monitoring the status of recovered species within a State to assure that such species do not return to the point at which the measures provided pursuant to this chapter are again necessary.

So much of the annual appropriation made in accordance with provisions of subsection (i) of this section allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.

(2) Such cooperative agreements shall provide for (A) the actions to be taken by the Secretary and the States; (B) the benefits that are expected to be derived in connection with the conservation of endangered or threatened species; (C) the estimated cost of these actions; and (D) the share of such costs to be borne by the Federal Government and by the States; except that-

(i) the Federal share of such program costs shall not exceed 75 percent of the estimated program cost stated in the agreement; and

(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one or more endangered or threatened species, the conservation of which

may be enhanced by cooperation of such States, enter jointly into an agreement with the Secretary.

The Secretary may, in his discretion, and under such rules and regulations as he may prescribe, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement. For the purposes of this section, the non-Federal share may, in the discretion of the Secretary, be in the form of money or real property, the value of which will be determined by the Secretary, whose decision shall be final.

**(e) Review of State programs**

Any action taken by the Secretary under this section shall be subject to his periodic review at no greater than annual intervals.

**(f) Conflicts between Federal and State laws**

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

**(g) Transition**

(1) For purposes of this subsection, the term "establishment period" means, with respect to any State, the period beginning on December 28, 1973, and ending on whichever of the following dates first occurs: (A) the date of the close of the 120-day period following the adjournment of the first regular session of the legislature of such State which commences after December 28, 1973, or (B) the date of the close of the 15-month period following December 28, 1973.

(2) The prohibitions set forth in or authorized pursuant to [sections 1533\(d\) and 1538\(a\)\(1\)\(B\) of this title](#) shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law) within any State-

(A) which is then a party to a cooperative agreement with the Secretary pursuant to subsection (c) of this section (except to the extent that the taking of any such species is contrary to the law of such State); or

(B) except for any time within the establishment period when-

(i) the Secretary applies such prohibition to such species at the request of the State, or

(ii) the Secretary applies such prohibition after he finds, and publishes his finding, that an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hearing or comment provisions of [section 553 of title 5](#) or any other provision of this chapter; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

## (h) Regulations

The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

## (i) Appropriations

(1) To carry out the provisions of this section for fiscal years after September 30, 1988, there shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an amount equal to 5 percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under [section 669b of this title](#), and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

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

### §1532. Definitions

For the purposes of this chapter-

(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 "best scientific and commercial data available" includes all such data submitted by a State, tribal, or county government.

(3) 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 exhibition of commodities by museums or similar cultural or historical organizations.

(4) 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 chapter 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.

(5) 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.

(6)(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 1533 of this title](#), 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 1533 of this title](#), 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)] (7)** 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 chapter would present an overwhelming and overriding risk to man.

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

**[(8)] (9)** 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)] (10)** 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)] (11)** 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.

**[(11)] (12)** Repealed. Pub. L. 97-304, §4(b), Oct. 13, 1982, 96 Stat. 1420.

**[(12)] (13)** 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 1536 of this title](#), any person whose application to such agency for a permit or license has been denied primarily because of the application of [section 1536\(a\) of this title](#) to such agency action.

**[(13)] (14)** 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)] (15)** The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

**[(15)] (16)** 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.

**[(16)] (17)** The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

**[(17)] (18)** 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)] (19)** 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)] (20)** 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)] (21)** 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)] (22)** The term "United States", when used in a geographical context, includes all States.

### **Section 7n of the Endangered Species Act of 1973 (16 U.S.C. 1536(n))**

#### **(n) Judicial review**

Any person, as defined by section **[(3)] (3)(14)** of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.