

ENSURING MEANINGFUL PETITION OUTREACH WHILE
ENHANCING RIGHTS OF STATES ACT OF 2018

NOVEMBER 27, 2018.—Committed to the Committee of the Whole House on the
State of the Union and ordered to be printed

Mr. BISHOP of Utah, from the Committee on Natural Resources,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 6345]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 6345) to provide for greater county and State consultation with regard to petitions under the Endangered Species Act of 1973, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 6345 is to provide for greater county and State consultation with regard to petitions under the Endangered Species Act of 1973.

BACKGROUND AND NEED FOR LEGISLATION

The Endangered Species Act of 1973 (ESA, 16 U.S.C. 1531 et seq.) sets out the broad goal of conserving and recovering species facing extinction. The law authorizes federal agencies to identify imperiled species and list them as either threatened or endangered, as appropriate.¹ The law further requires agencies to take nec-

¹ 16 U.S.C. §1533.

essary 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, 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

² *Id.*

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

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.

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 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.

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 complete 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

¹³ *Id.*

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.*

and data into consideration at the time.²⁰ 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 Ensuring Meaningful Petition Outreach While Enhancing Rights of States Act of 2018, or 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 do not comport with the information provided by the 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.

SECTION-BY-SECTION ANALYSIS

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

Subsection (a). County and State Consultation on Petitions. Amends Section 4(b)(3) of the ESA by requiring petitioners 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 relevant 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 relevant 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 relevant 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.

Subsection (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 relevant 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

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>.

writing for the determination and the information available to support that determination.

Subsection (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 relevant Secretary must provide written justification that includes any information regarding the determination and comments that disagreed with the regulation.

COMMITTEE ACTION

H.R. 6345 was introduced on July 12, 2018, by Congressman Stevan Pearce (R-NM). The bill was referred to the Committee on Natural Resources. On September 26, 2018, the Committee held a hearing on the bill. On September 27, 2018, the Committee met to consider the bill. No amendments were offered, and the bill was ordered favorably reported to the House of Representatives by a roll call vote of 20 yeas and 12 nays, as follows:

Committee on Natural Resources

U.S. House of Representatives

115th Congress

Date: 09.27.18

Recorded Vote #:3

Meeting on / Amendment on: FC Markup Favorably Report HR 6345 (Rep. Stevan Pearce)

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Bishop, UT, Chairman	X			Mr. Cook, CA	X		
<i>Mr. Grijalva, AZ, Ranking Member</i>		X		<i>Mr. McEachin, VA</i>			
Mr. Young, AK, Chairman Emeritus	X			Mr. Westerman, AR	X		
<i>Mrs. Napolitano, CA</i>		X		<i>Mr. Brown, MD</i>		X	
Mr. Gohmert, TX, Vice Chairman				Mr. Graves, LA	X		
<i>Ms. Bordallo, Guam</i>		X		<i>Mr. Clay, MO</i>			
Mr. Lamborn, CO	X			Mr. Hice, GA	X		
<i>Mr. Costa, CA</i>		X		<i>Mr. Gomez, CA</i>			
Mr. Wittman, VA	X			Mrs. Radewagen, AS			
<i>Mr. Sablan, CNMI</i>				<i>Ms. Velázquez, NY</i>			
Mr. McClintock, CA	X			Mr. Webster, FL	X		
<i>Ms. Tsongas, MA</i>		X		Mr. Bergman, MI	X		
Mr. Pearce, NM	X			Ms. Cheney, WY	X		
<i>Mr. Huffman, CA</i>		X		Mr. Johnson, LA	X		
Mr. Thompson, PA	X			Ms. González-Colón, PR			
<i>Mr. Lowenthal, CA</i>				Mr. Gianforte, MT	X		
Mr. Gosar, AZ	X			Mr. Curtis, UT	X		
<i>Mr. Beyer, VA</i>		X					
Mr. Labrador, ID							
<i>Mr. Gallego, AZ</i>		X					
Mr. Tipton, CO	X						
<i>Ms. Hanabusa, HI</i>		X					
Mr. LaMalfa, CA	X						
<i>Ms. Barragán, CA</i>		X					
Mr. Denham, CA							
<i>Mr. Soto, FL</i>		X		TOTAL:	20	12	

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII AND CONGRESSIONAL BUDGET ACT

1. Cost of Legislation and the Congressional Budget Act. With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for the bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 13, 2018.

Hon. ROB BISHOP,
*Chairman, Committee on Natural Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 6345, the EMPOWERS Act of 2018.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Janani Shankaran.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 6345—EMPOWERS Act of 2018

Under the Endangered Species Act, individual people can petition the U.S. Fish and Wildlife Service (USFWS) of the National Oceanic and Atmospheric Administration (NOAA) to list or remove a species. In such cases, H.R. 6345 would require USFWS and NOAA to solicit information from officials in the states and counties where the species is found. The bill also would require USFWS or NOAA to notify state and local officials about proposed rules under the Endangered Species Act and to submit certain public comments to those officials.

CBO expects that implementing the new requirements would result in a small increase in the agencies' workload. Based on the costs of similar tasks, CBO estimates that those costs would be less than \$500,000 over the 2019–2023 period; such spending would be subject to the availability of appropriated funds.

H.R. 6345 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 6345 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 6345 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Janani Shankaran. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

2. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to provide for greater county and State consultation with regard to petitions under the Endangered Species Act of 1973.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

COMPLIANCE WITH H. RES. 5

Directed Rule Making. This bill contains no directed rulemakings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95-220, as amended by Public Law 98-169) as relating to other programs.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT OF 1973

* * * * *

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

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

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

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

- (C) disease or predation;
 - (D) the inadequacy of existing regulatory mechanisms; or
 - (E) other natural or manmade factors affecting its continued existence.
- (2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—
- (A) in any case in which the Secretary of Commerce determines that such species should—
 - (i) be listed as an endangered species or a threatened species, or
 - (ii) be changed in status from a threatened species to an endangered species, he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;
 - (B) in any case in which the Secretary of Commerce determines that such species should—
 - (i) be removed from any list published pursuant to subsection (c) of this section, or
 - (ii) be changed in status from an endangered species to a threatened species, he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and
 - (C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.
- (3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—
- (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
 - (ii) may, from time-to-time thereafter as appropriate, revise such designation.
- (B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.
- (ii) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) with respect to an agency action (as that term is defined in that section).
 - (iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 9, including the prohibition preventing extinction and taking of endangered species and threatened species.
- (b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him

after conducting a review of the status of the species and after 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, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

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

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

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

(iii) The petitioned action is warranted but that—

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

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary, in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

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

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

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

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

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

(E) 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 ac-

tion 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, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.

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

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

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

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

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

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

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

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

(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.

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

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

(I) a final regulation to implement such determination,

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

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

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

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

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

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

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

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

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish and wildlife or plants, but only if—

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

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

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data avail-

able to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

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

(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.).*

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

(2) The Secretary shall—

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

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

(i) be removed from such list;

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

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

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

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

(e) **SIMILARITY OF APPEARANCE CASES.**—The Secretary may, by regulation of commerce or taking, and to the extent he deems ad-

visible, treat any species as an endangered species or threatened species even through it is not listed pursuant to section 4 of this Act if he finds that—

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

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

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

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

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

(B) incorporate in each plan—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(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.*

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DISSENTING VIEWS

This legislation is part of a package of nine Republican bills, spearheaded by the Western Caucus, introduced late in the second session of this Congress, and designed to destroy the Endangered Species Act. Each bill has its own, logic-defying, acronym.

H.R. 6345 undermines the ability of the Secretaries of Interior and Commerce to list a species as threatened or endangered under the Endangered Species Act (ESA). The listing of a species should be based solely on the best-available scientific and commercial data; however, this bill would inject political considerations into the listing decision which would make it extremely difficult for a new species to be listed.

Currently, federal agencies are required to make a finding within 90 days of receiving a petition as to whether there is substantial information indicating that the petitioned action may be warranted. If this finding is positive, the agencies conduct a status review and, within one year of receipt of the petition, make a finding on whether listing is warranted. The agencies then publish a proposed rule for public review before making a final listing determination.

Section 4 of the ESA already requires federal agencies to give notice, invite comments, and provide the complete text of a listing decision to any affected state or county.

Conversely, this bill provides states with significant control over listing decisions which could result in an imperiled species not receiving the protections it needs. This bill requires anyone who submits a petition to notify an unspecified "chief executive" of each county and state in which the species is located of such petition, and it requires the Secretary to solicit from each chief executive information regarding threats to the species, anticipated effects of the listing (including economic impacts), and advice of the chief executive on whether the species merits protection.

If a chief executive deems the listing could be unwarranted, the Secretary cannot proceed with the action unless he or she demonstrates that the information submitted by the chief executive is incorrect. If the Secretary moves forward with a final listing decision, he or she must provide notice of the proposed rule to the chief executive of each county and state in which the species is located and again invite the chief executive to provide comment on whether the proposal is warranted. If the Secretary adopts a final regulation in conflict with advice submitted by any chief executive or fails to adopt a petition requested by a chief executive, the Secretary must provide them with a written justification explaining why the decision diverged from the chief executive's findings or advice.

H.R. 6345 creates a massive amount of bureaucracy with the sole intention of making it nearly impossible to list a new species. For example, the whooping crane can be found in 17 states and over

700 counties. If the whooping crane was not yet listed, this bill would require federal agencies to consult with over 700 different chief executives to determine whether the species warrants protection. This process ultimately guarantees that the species would never be listed due to the absurd number of individuals the Secretary must consult with and the amount of time that the process would take.

The bill does not specify who is considered the chief executive of each county and state, which could potentially result in unqualified individuals participating in listing decisions, nor does it specify how the Secretary should proceed if he or she receives conflicting advice from different chief executives.

Finally, the bill places an unnecessary burden on the Secretary to consult and provide additional information to the states, even though Section 4 of the ESA already requires federal agencies to give notice, invite comments, and provide the complete text of a listing decision to any affected state or county.

For these reasons, we cannot support the bill as reported.

RAÚL M. GRIJALVA,
*Ranking Member, Committee
on Natural Resources.*

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