

## FEDERALLY INTEGRATED SPECIES HEALTH ACT

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JULY 18, 2018.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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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. 3916]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 3916) to amend the Endangered Species Act of 1973 to vest in the Secretary of the Interior functions under that Act with respect to species of fish that spawn in fresh or estuarine waters and migrate to ocean waters, and species of fish that spawn in ocean waters and migrate to fresh waters, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

#### SECTION 1. SHORT TITLE.

This Act may be cited as the “Federally Integrated Species Health Act” or the “FISH Act”.

#### SEC. 2. TRANSFER OF FUNCTIONS WITH RESPECT TO ANADROMOUS SPECIES AND CATADROMOUS SPECIES.

(a) TRANSFER OF FUNCTIONS.—All functions with respect to anadromous species and catadromous species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) that were vested in the Secretary of Commerce or the National Marine Fisheries Service immediately before the enactment of this Act are transferred to the Secretary of the Interior.

(b) CONFORMING AMENDMENTS.—The Endangered Species Act of 1973 is amended—

- (1) in section 3(15) (16 U.S.C. 1532(15))—
  - (A) by inserting “(A)” after “(15)”; and
  - (B) by adding at the end the following:

“(B) Notwithstanding subparagraph (A), with respect to anadromous species and catadromous species, the term ‘Secretary’ means the Secretary of the Interior.”; and

(2) in section 3 (16 U.S.C. 1532) by adding at the end the following:

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

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

### SEC. 3. MISCELLANEOUS PROVISIONS.

(a) REFERENCES.—Any reference in any other Federal law, Executive order, rule, regulation, or delegation of authority, or any document of or pertaining to a department or office from which a function is transferred by this Act—

(1) to the head of such department or office is deemed to refer to the Secretary of the Interior; or

(2) to such department or office is deemed to refer to the Department of the Interior.

(b) EXERCISE OF AUTHORITIES.—Except as otherwise provided by law, the Secretary of the Interior may, for purposes of performing the functions transferred by this Act, exercise all authorities under the Endangered Species Act of 1973 that were available with respect to the performance of that function immediately before the effective date of the transfer of the function under this Act.

(c) SAVINGS PROVISIONS.—

(1) LEGAL DOCUMENTS.—All orders, determinations, rules, regulations, permits, grants, loans, contracts, agreements, certificates, licenses, and privileges—

(A) that have been issued, made, granted, or allowed to become effective by the Secretary of Commerce, any officer or employee of the Department of Commerce, or any other Government official in the performance of any function that is transferred by this Act, or by a court of competent jurisdiction with respect to such performance; and

(B) that are in effect on the effective date of this Act (or become effective after such date pursuant to their terms as in effect on such effective date), shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the President, any other authorized official, a court of competent jurisdiction, or operation of law.

(2) PROCEEDINGS.—

(A) IN GENERAL.—This Act shall not affect any proceedings or any application for any benefits, service, license, permit, certificate, or financial assistance pending on the date of the enactment of this Act before an office transferred by this Act. Such proceedings and applications shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted, and orders issued in any such proceeding shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law.

(B) LIMITATION.—Nothing in this paragraph shall be considered to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

(3) SUITS.—This Act shall not affect suits commenced before the date of the enactment of this Act, and in all such suits, proceeding shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if this Act had not been enacted.

(4) NONABATEMENT OF ACTIONS.—No suit, action, or other proceeding commenced by or against the Department of Commerce or the Secretary of Commerce, or by or against any individual in the official capacity of such individual as an officer or employee of the Department of Commerce, shall abate by reason of the enactment of this Act.

(5) CONTINUANCE OF SUITS.—If any Government officer in the official capacity of such officer is party to a suit with respect to a function of the officer, and under this Act such function is transferred to any other officer or office, then such suit shall be continued with the other officer or the head of such other office, as applicable, substituted or added as a party.

(6) ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW.—Except as otherwise provided by this Act, any statutory requirements relating to notice, hearings, action upon the record, or administrative or judicial review that apply to any function transferred by this Act shall apply to the exercise of such function by the head of the Federal agency, and other officers of the agency, to which such function is transferred by this Act.

#### SEC. 4. DEFINITIONS.

For purposes of this Act:

(1) ANADROMOUS SPECIES AND CATADROMOUS SPECIES.—Each of the terms “anadromous species” and “catadromous species” has the meaning that term has under section 3 of the Endangered Species Act of 1973, as amended by section 2 of this Act.

(2) FUNCTION.—The term “function” includes any duty, obligation, power, authority, responsibility, right, privilege, activity, or program.

(3) OFFICE.—The term “office” includes any office, administration, agency, bureau, institute, council, unit, organizational entity, or component thereof.

#### PURPOSE OF THE BILL

The purpose of H.R. 3916 is to amend the Endangered Species Act of 1973 to vest in the Secretary of the Interior functions under the Act with respect to species of fish that spawn in fresh or estuarine waters and migrate to ocean waters, and species of fish that spawn in ocean waters and migrate to fresh waters.

#### BACKGROUND AND NEED FOR LEGISLATION

##### *The Endangered Species Act of 1973*

In response to fears over dwindling populations of plant and animal species, Congress passed the Endangered Species Act of 1973 (ESA, 16 U.S.C. 1531 et seq.). ESA sets out the broad goal of conserving and recovering species facing extinction.<sup>1</sup> The law authorizes federal agencies to identify imperiled species and list them as either threatened or endangered as appropriate.<sup>2</sup> The law further requires agencies to take necessary actions to conserve those species and their habitats. Congress made significant amendments to the ESA in 1978, 1982, and 1988, though the overall framework has remained essentially unchanged since its original enactment in 1973.<sup>3</sup> In 44 years, there have been 2,335 total listings of species as either “endangered” or “threatened”, thus triggering ESA protections.<sup>4</sup> In that time, of the 72 total species delisted, only 42 distinct species have been removed, either entirely or partially throughout their range, due to population recovery.<sup>5</sup>

Under the ESA, the Secretary of the Interior, through the U.S. Fish and Wildlife Service (FWS), has responsibility for plants, wildlife and inland fisheries. The Secretary of Commerce, through the National Marine Fisheries Service (NMFS), is responsible for implementing the ESA with respect to ocean-going fish and some marine mammals.<sup>6</sup> If federal actions<sup>7</sup> might affect a listed species, section 7 of the ESA requires federal agencies that would carry out such actions to consult with FWS or NMFS to “ensure that their actions are ‘not likely to jeopardize the continued existence’ of any endangered or threatened species, nor to adversely modify critical habitat”.<sup>8</sup>

When otherwise lawful actions occurring on private lands that lack a federal nexus impact a listed species, the appropriate Sec-

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

<sup>2</sup>16 U.S.C. § 1533.

<sup>3</sup>A History of the Endangered Species Act of 1973, United States Fish and Wildlife Service.

<sup>4</sup>Listed Species Summary, Environmental Conservation Online System, United States Fish and Wildlife Service.

<sup>5</sup>Delisted Species, Environmental Conservation Online System, United States Fish and Wildlife Service.

<sup>6</sup>Congressional Research Service Report “The Endangered Species Act: A Primer,” p. 8.

<sup>7</sup>As defined in 40 Code of Federal Regulations 1508.18.

<sup>8</sup>Id.

retary may issue an incidental take permit.<sup>9</sup> These ESA section 10 permits require applicants to submit a conservation plan outlining the impacts of the takings and steps the applicant will take to reduce such impacts along with any alternatives that could avoid such impacts.<sup>10</sup>

#### *Regulatory duplication*

FWS or NMFS completes its section 7 consultation process with the issuance of a Biological Opinion (BiOp) determining whether the federal action will jeopardize the continued existence of the species in question or adversely modify critical habitat.<sup>11</sup> If the BiOp concludes “no jeopardy” to the species, then the agency issues an incidental take statement allowing the action to continue.<sup>12</sup> If the BiOp concludes that the proposed action “jeopardizes” a species, then the agency outlines Reasonable and Prudent Alternative courses of action (RPAs) that will allow the action to move forward without jeopardizing the species.<sup>13</sup> If no such RPAs exist, the action is not permitted to proceed.

In many cases, federal and private actions impact multiple species that fall under the jurisdiction of both FWS and NMFS. In such instances, both FWS and NMFS issue BiOps detailing impacts on their respective species and detailing RPAs to mitigate jeopardy if necessary. This redundant exercise can result in competing recommendations and in some cases, irreconcilable mandates, such as in the example below.

#### *Examples of Agency duplication*

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

<sup>9</sup> 16 U.S.C. § 1539.

<sup>10</sup> Id.

<sup>11</sup> 16 U.S.C. § 1536(b).

<sup>12</sup> 16 U.S.C. § 1536(b)(4).

<sup>13</sup> Id.

<sup>14</sup> Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project, Southwest Region, National Marine Fisheries Service, June 4, 2009, p. 602.

<sup>15</sup> [http://www.westcoast.fisheries.noaa.gov/publications/Central\\_Valley/Water%20Operations/nmfs\\_march\\_31\\_2016\\_response\\_to\\_the\\_bureau\\_of\\_reclamation\\_s\\_march\\_forecast.pdf](http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/nmfs_march_31_2016_response_to_the_bureau_of_reclamation_s_march_forecast.pdf), p. 4.

<sup>16</sup> [http://valadao.house.gov/uploadedfiles/june\\_2016\\_letter\\_to\\_u.s.\\_interior\\_and\\_u.s.\\_commerce.pdf](http://valadao.house.gov/uploadedfiles/june_2016_letter_to_u.s._interior_and_u.s._commerce.pdf), p. 1.

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

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

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

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

<sup>18</sup> <http://valadao.house.gov/uploadedfiles/>

June 2016 letter to u.s. interior and u.s. commerce.pdf, p. 2.

<sup>19</sup> Written Testimony of Mr. Ara Azhderian before the Subcommittee on Water, Power and Oceans, Oversight Hearing “Changing Demands and Water Supply Uncertainty in California”, July 12, 2016, p. 2.

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

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

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

<sup>23</sup> *Id.*, p. 2.

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

The different approach each agency takes to ESA section 4(d) rules creates further uncertainty for those attempting to navigate the interjurisdictional regulatory web. While the ESA applies a blanket prohibition on takings of endangered species,<sup>25</sup> this prohibition does not extend to threatened species. Section 4(d) authorizes each agency to promulgate regulations “the Secretary deems necessary and advisable to provide for the conservation of [threatened] species.”<sup>26</sup> NMFS applies 4(d) rules to threatened species in its jurisdiction on a case-by-case basis, whereas FWS uses its 4(d) authority to extend a blanket taking prohibition to all threatened species in its jurisdiction and in some instances applies tailored rules to individual threatened species.<sup>27</sup> When the ESA requires both agencies to participate in a section 7 consultation or to issue a section 10 permit, these differing regulatory styles add unnecessary hurdles to an already extensive review process.

#### *H.R. 3916—The FISH Act*

In 1966 Congress passed the Marine Resources and Engineering Development Act (Public Law 89-454), which established a Commission on Marine Science, Engineering and Resources. The legislation directed the Commission to “make a comprehensive investigation and study of all aspects of marine science in order to recommend an overall plan for an adequate national oceanographic program that will meet the present and future national needs.”<sup>28</sup> The Commission published its final report “Our Nation and the Sea: A Plan for National Action” which laid the foundation for creation of the National Oceanic and Atmospheric Administration (NOAA).<sup>29</sup> President Nixon incorporated the Commission’s recommendation into his Advisory Council on Executive Organization which recommended that this new agency be housed in the Department of the Interior (DOI).<sup>30</sup> Nearly two-thirds of this new agency’s budget would comprise the budget of the Environmental Science Services Administration (ESSA) which operated within the Department of Commerce. Citing the prevalence of ESSA’s resources in the new budget for NOAA, then-Secretary of Commerce Maurice Stans—aided by political strife between President Nixon and his DOI Secretary—successfully argued that NOAA should be temporarily housed in the Department of Commerce.<sup>31</sup> On October 3, 1970, President Nixon created NOAA as part of Reorganization Plan No. 4, placing it in the Department of Commerce.<sup>32</sup>

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

<sup>25</sup> 16 U.S.C. § 1538(a).

<sup>26</sup> 16 U.S.C. § 1533(d).

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

<sup>28</sup> 80 Stat 206.

<sup>29</sup> A History of NOAA, National Oceanic and Atmospheric Administration.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 84 Stat. 2090-3.

<sup>33</sup> State of the Union Address, President Barack Obama, 2011.

dent Obama formally proposed the idea of merging NOAA into DOI in 2012 in his Fiscal Year (FY) 2013 budget request and echoed the 2012 proposal in his FY 2016 budget request.<sup>34 35</sup>

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

#### SECTION-BY-SECTION ANALYSIS

##### *Section 1. Short title*

This Act may be cited as “Federally Integrated Species Health Act” or “FISH Act”.

##### *Section 2. Transfer of functions with respect to anadromous species and catadromous species*

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

##### *Section 3. Miscellaneous provisions*

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

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

##### *Section 4. Definitions*

This section defines several key terms including “anadromous species” and “catadromous species”.

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<sup>34</sup> Fiscal Year 2013 Budget of the United States, p. 41.

<sup>35</sup> Fiscal Year 2016 Budget of the United States, p. 81.

## COMMITTEE ACTION

H.R. 3916 was introduced on October 3, 2017, by Congressman Ken Calvert (R-CA). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Water, Power and Oceans. On October 12, 2017, the Subcommittee held a hearing on the legislation. On May 16, 2018, the Natural Resources Committee met to consider the bill. The Subcommittee was discharged by unanimous consent. Congressman Doug Lamborn (R-CO) offered an amendment designated #1; it was adopted by voice vote. No further amendments were offered and the bill, as amended, was ordered favorably reported to the House of Representatives by a bipartisan roll call vote of 22 yeas and 14 nays, as follows:



**Committee on Natural Resources**

U.S. House of Representatives

115th Congress

Date: 05.16.18

Recorded Vote #:3

Meeting on / Amendment on: **FC Markup Favorably Report HR 3916 (Rep. Ken Calvert)**

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
<b>Mr. Bishop, UT, Chairman</b>	X			<b>Mr. Cook, CA</b>	X		
<i>Mr. Grijalva, AZ, Ranking Member</i>		X		<i>Mr. McEachin, VA</i>		X	
<b>Mr. Young, AK, Chairman Emeritus</b>	X			<b>Mr. Westerman, AR</b>	X		
<i>Mrs. Napolitano, CA</i>		X		<i>Mr. Brown, MD</i>			
<b>Mr. Gohmert, TX, Vice Chairman</b>	X			<b>Mr. Graves, LA</b>	X		
<i>Ms. Bordallo, Guam</i>		X		<i>Mr. Clay, MO</i>		X	
<b>Mr. Lamborn, CO</b>	X			<b>Mr. Hice, GA</b>	X		
<i>Mr. Costa, CA</i>	X			<i>Mr. Gomez, CA</i>		X	
<b>Mr. Wittman, VA</b>	X			<b>Mrs. Radewagen, AS</b>			
<i>Mr. Sablan, CNMI</i>		X		<i>Ms. Velázquez, NY</i>			
<b>Mr. McClintock, CA</b>	X			<b>Mr. Webster, FL</b>			
<i>Ms. Tsongas, MA</i>		X		<b>Mr. Bergman, MI</b>	X		
<b>Mr. Pearce, NM</b>				<b>Ms. Cheney, WY</b>	X		
<i>Mr. Huffman, CA</i>		X		<b>Mr. Johnson, LA</b>	X		
<b>Mr. Thompson, PA</b>	X			<b>Ms. González-Colón, PR</b>	X		
<i>Mr. Lowenthal, CA</i>		X		<b>Mr. Gianforte, MT</b>	X		
<b>Mr. Gosar, AZ</b>	X			<b>Mr. Curtis, UT</b>	X		
<i>Mr. Beyer, VA</i>							
<b>Mr. Labrador, ID</b>							
<i>Mr. Gallego, AZ</i>		X					
<b>Mr. Tipton, CO</b>	X						
<i>Ms. Hanabusa, HI</i>		X					
<b>Mr. LaMalfa, CA</b>	X						
<i>Ms. Barragán, CA</i>		X					
<b>Mr. Denham, CA</b>	X						
<i>Mr. Soto, FL</i>		X		<b>TOTAL:</b>	22	14	

## 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, June 25, 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. 3916, the FISH Act.

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

Sincerely,

KEITH HALL,  
*Director.*

Enclosure.

*H.R. 3916—FISH Act*

H.R. 3916 would amend the Endangered Species Act (ESA) to transfer all authority for managing the species of fish that migrate between freshwater and saltwater to the U.S. Fish and Wildlife Service (USFWS). Currently, the responsibility is shared by USFWS and the National Oceanic and Atmospheric Administration (NOAA).

In 2018, NOAA allocated appropriations totaling \$140 million to support 363 agency staff who manage the affected fish populations. Those employees conduct research and monitoring, engage in inter-agency consultations, complete habitat conservation plans, and implement recovery actions. CBO expects that NOAA's workforce and budget would be reduced under the bill and that any reduction in spending would be offset by a corresponding increase in USFWS spending.

Implementing H.R. 3916 could affect the federal budget if the transfer of authority affected the amount of work space necessary for one or both agencies or the number of employees needed to carry out the activities required under the ESA. However, CBO lacks sufficient information regarding how the agencies would implement the bill to determine whether such effects would result in any significant net increase or decrease in spending; any increased spending would be subject to the availability of appropriated funds.

Enacting H.R. 3916 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 3916 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 3916 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Jeff LaFave. 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 amend the Endangered Species Act of 1973 to vest in the Secretary of the Interior functions under the Act with respect to species of fish that spawn in fresh or estuarine waters and migrate to ocean waters, and species of fish that spawn in ocean waters and migrate to fresh waters.

#### 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 does not contain any directed rule makings.

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 (new matter is printed in *italic* and existing law in which no change is proposed is shown in *roman*):

#### ENDANGERED SPECIES ACT OF 1973

\* \* \* \* \*

## DEFINITIONS

SEC. 3. For the purposes of this Act—

(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 “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 exhibitions of commodities by museums or similar cultural or historical organizations.

(3) 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 Act 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.

(4) 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.

(5)(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 4 of this Act, 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 4 of this Act, 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) 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 Act would present an overwhelming and overriding risk to man.

(7) The term “Federal agency” means any department, agency, or instrumentality of the United States.

(8) 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) 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) 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.

(12) 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 7, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) to such agency action.

(13) 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) The term “plant” means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15)(A) The term “Secretary” means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

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

(16) 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) 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) The term “State agency” means any State agency, department, board, commission, or other governmental entity which is re-

sponsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) 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) 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) The term “United States,” when used in a geographical context, includes all States.

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

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

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## DISSENTING VIEWS

H.R. 3916 transfers management of certain endangered fish species from the National Marine Fisheries Service (NMFS), an agency within the Commerce Department, to the Department of the Interior (DOI). Because the bill fails to account for the complexities of protecting endangered fish, we cannot support H.R. 3916.

Anadromous fish are born and spawn in fresh water, but spend most of their lives in the ocean, while catadromous species spend most of their lives in fresh water, but breed in the ocean. Many anadromous species of fish are listed under the Endangered Species Act (ESA), including 28 salmon and steelhead populations on the West Coast, Atlantic salmon, and 13 sturgeon species. There are no catadromous species currently listed under the ESA. H.R. 3916 would transfer management of these species to DOI.

Given that ESA-listed anadromous fish spend most of their lives in the open ocean, the National Marine Fisheries Service is the appropriate agency to manage these populations, not the Interior Department. Marine fisheries are inherently different from freshwater fisheries in both environmental and policy contexts. Endangered fish management across habitats is informed by life cycles; threats and recovery measures necessary for spawning and migrating salmon are different from measures necessary for adult salmon in the open ocean. While it is necessary for the Fish and Wildlife Service (FWS), an Interior Department agency, and NMFS to coordinate, transferring management of these species to Interior would undermine management and recovery of these endangered fish.

Additionally, H.R. 3916 fails to indicate how this management transition would be supported in the budget. The bill does not indicate if the existing NMFS budgets for both Atlantic and Pacific salmon would go to the FWS. Given the current lack of funding for the FWS to manage listed species, it is unclear if the already-strained agency would have the budget and personnel necessary to take on management of additional endangered species.

Several fishing and other non-governmental organizations, including the Pacific Coast Federation of Fishermen's Associations, League of Conservation Voters, Natural Resources Defense Council, Western Watersheds Project, and the Golden State Salmon Association, also oppose H.R. 3916.

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

NYDIA M. VELÁZQUEZ.

JARED HUFFMAN.

