

PROTECT AMERICA'S WILDLIFE AND FISH IN NEED OF
CONSERVATION ACT OF 2019

AUGUST 7, 2020.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. GRIJALVA, from the Committee on Natural Resources,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4348]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 4348) to terminate certain rules issued by the Secretary of the Interior and the Secretary of Commerce relating to endangered and threatened species, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 4348 is to terminate certain rules issued by the Secretary of the Interior and the Secretary of Commerce relating to endangered and threatened species, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

The world is losing species at unprecedented rates,¹ and strong endangered species protections are necessary to prevent future extinctions.

¹See generally SANDRA DIAZ, JOSEF SETTELE & EDUARDO BRONDÍZIO ET AL., INTERGOVERNMENTAL SCI-POLY PLATFORM ON BIODIVERSITY & ECOSYSTEM SERVS., SUMMARY FOR POLICY-MAKERS OF THE GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES OF THE INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERV-

Continued

The Endangered Species Act² (ESA) was signed into law in 1973 by President Nixon with overwhelming bipartisan support from Congress. The U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration acting through the National Marine Fisheries Service (collectively, the “Services”) are the two federal agencies that implement the ESA.

On August 27, 2019, the Trump administration published three final rules³ to the ESA that change the implementation of the law.⁴ It is the Committee’s view that these new rules undermine the intention of the law.

First, the new regulations allow the Services to evaluate economic factors alongside species listing decisions, which is contrary to the spirit of the ESA. The ESA requires listing determinations to be based “solely on the basis of the best scientific and commercial data available,” regardless of potential economic impacts.

Second, FWS has historically afforded threatened species the same protections as endangered species, under the “blanket 4(d) rule.”⁵ A threatened species is defined as one that is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁶ However, the new rules eliminate the blanket 4(d) rule for FWS listing decisions, which will result in threatened species no longer receiving these guaranteed protections under the ESA as they have for nearly 40 years. Under the new regulations, a newly listed threatened species will not receive protections unless issued a special 4(d) rule.

Third, the new regulations change the definition of “foreseeable future,” interpreting the foreseeable future as extending in time only as far as the Services can reasonably determine that future threats and the species’ response to those threats are “likely.” While the ESA does not define the term “foreseeable future,” a 2009 Department of Interior Solicitor’s Memorandum Opinion concluded that “Congress intended the term ‘foreseeable future’ to describe the extent to which the [agency] can reasonably rely on predictions about the future in making determinations about the future conservation status of the species.”⁷ Under the new regulation, the Services will determine the foreseeable future on a case-

ICES ADVANCE UNEDITED VERSION (2019), https://www.ipbes.net/sites/default/files/downloads/spm_unedited_advance_for_posting_htn.pdf.

²Endangered Species Act of 1973, Pub. L. No. 93–205, 87 Stat. 884 (1973), <https://uscode.house.gov/statviewer.htm?volume=87&page=884> (codified as amended largely at 16 U.S.C. §§ 1531 *et seq.*; see https://uscode.house.gov/table3/93_205.htm).

³Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (Aug. 27, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-08-27/pdf/2019-17519.pdf>; Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-08-27/pdf/2019-17517.pdf>; Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-08-27/pdf/2019-17518.pdf>.

⁴PERVAZE A. SHEIKH, ERIN H. WARD & R. ELIOT CRAFTON, CONG. RES. SERV., IF10944, FINAL RULES CHANGING ENDANGERED SPECIES ACT REGULATIONS (updated Sept. 25, 2019); *ESA Implementation | Regulation Revisions*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html (last updated Sept. 25, 2019).

⁵The name is a reference to ESA Section 4(d), which requires the relevant Secretary to issue a regulation that is as “necessary and advisable” to conserve a species when it is newly listed as threatened. Pub. L. No. 93–205, § 4(d), 487 Stat. at 888 (codified as 16 U.S.C. § 1533(d)).

⁶16 U.S.C. § 1532(20).

⁷Memorandum M-37021 from David Longly Bernhardt, Solicitor, U.S. Dep’t of the Interior, to the Acting Director, U.S. Fish & Wildlife Serv. (Jan. 16, 2009), <https://www.fws.gov/endangered/esa-library/pdf/M-37021%20Foreseeable%20future.pdf> (“The Meaning of ‘Foreseeable Future’ in Section 3(20) of the Endangered Species Act”) (citation omitted).

by-case basis, which could allow the Services to ignore any threats caused by climate change.

Fourth and finally, the new regulations allow the Services to create exemptions for critical habitat designations, particularly unoccupied critical habitat, which is often essential for the conservation and recovery of the species. A key feature of the ESA is the protection of critical habitat of threatened and endangered species. Previous regulations have made it clear that critical habitat “will” be designated unless such designation “would not be beneficial to the species,”⁸ and previous practice has also protected unoccupied habitat. Furthermore, Section 7 of the ESA requires federal agencies to consult with the Secretary to ensure their actions will not jeopardize species’ survival or destroy or degrade critical habitat. Through Section 7, Congress prohibited federal agencies from taking any action that would result in the “destruction or adverse modification” of critical habitat.⁹ Thus, by limiting critical habitat designations, the new rules also clip the wings of Section 7 consultations and the extent to which those consultations can contribute in a positive way toward the recovery of threatened and endangered species.

H.R. 4348 repeals all three of the Trump administration’s rules. Despite chronic underfunding of the ESA, 99 percent of species listed under the ESA have not gone extinct,¹⁰ and the ESA continues to enjoy bipartisan support across our country.¹¹ This bill maintains the integrity of the ESA to continue recovering species on the brink of extinction based on the best available science, as Congress intended.

COMMITTEE ACTION

H.R. 4348 was introduced on September 17, 2019, by Chair Raúl M. Grijalva (D–AZ). The bill was referred solely to the Committee on Natural Resources, and within the Committee to the Subcommittee on Water, Oceans, and Wildlife. On September 24, 2019, the Subcommittee held a hearing on the bill. On January 29, 2020, the Natural Resources Committee met to consider the bill. The Subcommittee was discharged by unanimous consent. Representative Paul A. Gosar (R–AZ) offered an amendment in the nature of a substitute designated #195. The amendment was not agreed to by a roll call vote of 15 yeas and 22 nays, as follows:

⁸ 50 C.F.R. § 424.12(a)(1)(ii) (2018), <https://www.govinfo.gov/content/pkg/CFR-2018-title50-vol11/pdf/CFR-2018-title50-vol11-sec424-12.pdf>.

⁹ 16 U.S.C. § 1536(a)(2).

¹⁰ U.S. FISH & WILDLIFE SERV., ENDANGERED SPECIES RECOVERY PROGRAM, at 2 (2011), <https://www.fws.gov/endangered/esa-library/pdf/recovery.pdf>.

¹¹ Jeremy T. Bruskotter et al., *Support for the U.S. Endangered Species Act Over Time and Space: Controversial Species Do Not Weaken Public Support for Protective Legislation*, CONSERVATION LETTERS (2018), <https://conbio.onlinelibrary.wiley.com/doi/pdf/10.1111/conl.12595>; see also *Support for the Endangered Species Act Remains High as Trump Administration and Congress Try to Gut It*, PBS: NEWS HOUR (July 21, 2018, 1:50 PM EDT), <https://www.pbs.org/newshour/science/support-for-the-endangered-species-act-remains-high-as-trump-administration-and-congress-try-to-gut-it> (citing *id.*); CTR. FOR BIOLOGICAL DIVERSITY, DEFS. OF WILDLIFE & ENDANGERED SPECIES COALITION, A WILD SUCCESS: AMERICAN VOICES ON THE ENDANGERED SPECIES ACT AT 40 (2014), https://www.biologicaldiversity.org/campaigns/esa_wild_success/pdfs/A_Wild_Success.pdf (collecting sources).

Date:

COMMITTEE ON NATURAL RESOURCES
116th Congress - Roll Call

Bill / Motion: H.R. 4348

Amendment: Rep. Gosar #195 - Amendment in the nature of a Substitute

Disposition: Not agreed to by a roll call vote of 15 yeas and 22 nays.

	DEM. MEMBERS (25)	YEAS	NAYS	PRESENT
1	Mr. Brown, MD		X	
2	Mr. Cartwright, PA		X	
3	Mr. Case, HI		X	
4	Mr. Clay, MO			
5	Mr. Costa, CA		X	
6	Mr. Cox, CA		X	
7	Mr. Cunningham, SC		X	
8	Ms. DeGette, CO		X	
9	Mrs. Dingell, MI		X	
10	Mr. Gallego, AZ		X	
11	Mr. Grijalva, AZ (Chair)		X	
12	Mr. Garcia, IL		X	
13	Ms. Haaland, NM		X	
14	Mr. Horsford, NV		X	
15	Mr. Huffman, CA		X	
16	Mr. Levin, CA		X	
17	Mr. Lowenthal, CA		X	
18	Mr. McEachin, VA			
19	Ms. Napolitano, CA		X	
20	Mr. Neguse, CO		X	
21	Mr. Sablan, CNMI		X	
22	Mr. San Nicolas, GU		X	
23	Mr. Soto, FL		X	
24	Mr. Tonko, NY		X	
25	Ms. Velázquez, NY			
26				
	REP. MEMBERS (19)	Y	N	P
1	Mr. Bishop, UT (Ranking)	X		
2	Ms. Cheney, WY			
3	Mr. Cook, CA	X		
4	Mr. Curtis, UT	X		
5	Mr. Fulcher, ID	X		
6	Mr. Gohmert, TX	X		
7	Ms. González-Colón, PR			
8	Mr. Gosar, AZ	X		
9	Mr. Graves, LA	X		
10	Mr. Hern, OK	X		
11	Mr. Hice, GA	X		
12	Mr. Johnson, LA			
13	Mr. Lamborn, CO	X		
14	Mr. McClintock, CA	X		
15	Mrs. Radewagen, AS	X		
16	Mr. Webster, FL	X		
17	Mr. Westerman, AR	X		
18	Mr. Wittman, VA	X		
19	Mr. Young, AK			
	TOTALS	15	22	
	Total: 44 / Quorum: 15 / Report: 23	YEAS	NAYS	PRESENT

No additional amendments were offered. The bill was adopted and ordered favorably reported to the House of Representatives by a roll call vote of 21 yeas and 16 nays, as follows:

Date: January 29, 2020

COMMITTEE ON NATURAL RESOURCES
116th Congress - Roll Call

Bill / Motion: H.R. 4348

Amendment:

Disposition: Final Passage: H.R. 4348 was ordered favorably reported to the House of Representatives by a roll call vote of 21 yeas and 16 nays.

	DEM. MEMBERS (25)	YEAS	NAYS	PRESENT
1	Mr. Brown, MD	X		
2	Mr. Cartwright, PA	X		
3	Mr. Case, HI	X		
4	Mr. Clay, MO			
5	Mr. Costa, CA	X		
6	Mr. Cox, CA		X	
7	Mr. Cunningham, SC	X		
8	Ms. DeGette, CO	X		
9	Mrs. Dingell, MI	X		
10	Mr. Gallego, AZ	X		
11	Mr. Grijalva, AZ (Chair)	X		
12	Mr. García, IL	X		
13	Ms. Haaland, NM	X		
14	Mr. Horsford, NV	X		
15	Mr. Huffman, CA	X		
16	Mr. Levin, CA	X		
17	Mr. Lowenthal, CA	X		
18	Mr. McEachin, VA			
19	Ms. Napolitano, CA	X		
20	Mr. Neguse, CO	X		
21	Mr. Sablan, CNMI	X		
22	Mr. San Nicolas, GU	X		
23	Mr. Soto, FL	X		
24	Mr. Tonko, NY	X		
25	Ms. Velázquez, NY			
26				
	REP. MEMBERS (19)	Y	N	P
1	Mr. Bishop, UT (Ranking)		X	
2	Ms. Cheney, WY			
3	Mr. Cook, CA		X	
4	Mr. Curtis, UT		X	
5	Mr. Fulcher, ID		X	
6	Mr. Gohmert, TX		X	
7	Ms. González-Colón, PR			
8	Mr. Gosar, AZ		X	
9	Mr. Graves, LA		X	
10	Mr. Hern, OK		X	
11	Mr. Hice, GA		X	
12	Mr. Johnson, LA			
13	Mr. Lamborn, CO		X	
14	Mr. McClintock, CA		X	
15	Mrs. Radewagen, AS		X	
16	Mr. Webster, FL		X	
17	Mr. Westerman, AR		X	
18	Mr. Wittman, VA		X	
19	Mr. Young, AK			
	TOTALS	21	16	
	Total: 44 / Quorum: 16 / Report: 23	YEAS	NAYS	PRESENT

HEARINGS

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress—the following hearing was used to develop or consider H.R. 4348: legislative hearing held by the Subcommittee on Water, Oceans, and Wildlife on September 24, 2019.

SECTION-BY-SECTION ANALYSIS

*Section 1. Short title**Section 2. Termination of regulations relating to endangered and threatened species and restoration of prior regulations*

This section repeals the three final rules for the ESA issued on August 27, 2019, and mandates that the rules have no force or effect. The repealed rules are: “Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants”; “Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation”; and “Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat.”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, June 1, 2020.

Hon. RAÚL M. GRIJALVA,
*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. 4348, the PAW and FIN Conservation Act of 2019.

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

Sincerely,

PHILLIP L. SWAGEL
Director.

Enclosure.

¹²See sources cited *supra* note 3.

H.R. 4348, PAW and FIN Conservation Act of 2019			
As ordered reported by the House Committee on Natural Resources on January 29, 2020			
By Fiscal Year, Millions of Dollars	2020	2020-2025	2020-2030
Direct Spending (Outlays)	*	*	*
Revenues	*	*	*
Increase or Decrease (-) in the Deficit	*	*	*
Spending Subject to Appropriation (Outlays)	*	*	not estimated
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2031?	No	Contains intergovernmental mandate?	Yes, Cannot Determine Costs
		Contains private-sector mandate?	Yes, Cannot Determine Costs
* = between -\$500,000 and \$500,000.			

H.R. 4348 would void three regulations related to the Endangered Species Act (ESA) that were issued by the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration (NOAA) in 2019. Among other changes, those regulations:

- Clarified the criteria for delisting a species under the ESA,
- Changed the process for how federal agencies consult with USFWS and NOAA before starting a project that could affect a listed species, and
- Rescinded certain protections automatically applied to species listed as threatened.

CBO expects that implementing H.R. 4348 would not significantly affect the workload of USFWS or NOAA. Based on the costs of similar tasks, we estimate that any costs to issue new regulations or guidance under the bill would be insignificant; any spending would be subject to the availability of appropriated funds.

Enacting H.R. 4348 could increase civil and criminal penalties under the ESA (which are recorded as revenues) and the associated direct spending of those penalties. CBO expects that additional violations of the ESA would occur infrequently and we thus estimate that the net reduction in the deficit under the bill would be insignificant over the 2020–2030 period.

H.R. 4348 contains intergovernmental and private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA). CBO cannot determine whether the cost of the mandates would exceed the thresholds established in UMRA (\$84 million and \$168 million in 2020, respectively, adjusted annually for inflation).

The bill would revoke a rule that allows USFWS to establish species-specific protections for any species added to the threatened species list. Thus, under H.R. 4348 the agency could set different and possibly more rigorous restrictions for any species designated after enactment as threatened. (Current proposals call for 11 species to be added to the threatened list.)

Private and public entities could be required to meet stricter criteria for forest or soil management and to obtain permits for construction in regions where those threatened species would be found.

Because USFWS has not issued species-specific regulations for each potential designated species, CBO cannot determine how much the bill would tighten restrictions for those species or how much it would cost entities to comply with possibly tighter restrictions.

The CBO staff contacts for this estimate are Janani Shankaran (for federal costs) and Lilia Ledezma and Brandon Lever (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

2. *General Performance Goals and Objectives.* As required by clause 3(c)(4) of rule XIII, the general performance goals and objectives of this bill are to terminate certain rules issued by the Secretary of the Interior and the Secretary of Commerce relating to endangered and threatened species.

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.

UNFUNDED MANDATES REFORM ACT STATEMENT

According to CBO, H.R. 4348 contains intergovernmental and private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA). CBO cannot determine whether the cost of the mandates would exceed the thresholds established in UMRA (\$84 million and \$168 million in 2020, respectively, adjusted annually for inflation).

The bill would revoke a rule that allows USFWS to establish species-specific protections for any species added to the threatened species list. Thus, under H.R. 4348 the agency could set different and possibly more rigorous restrictions for any species designated after enactment as threatened. (Current proposals call for 11 species to be added to the threatened list.)

Private and public entities could be required to meet stricter criteria for forest or soil management and to obtain permits for construction in regions where those threatened species would be found. Because USFWS has not issued species-specific regulations for each potential designated species, CBO cannot determine how much the bill would tighten restrictions for those species or how much it would cost entities to comply with possibly tighter restrictions.

EXISTING PROGRAMS

This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

PREEMPTION OF STATE, LOCAL, OR TRIBAL LAW

Any preemptive effect of this bill over state, local, or tribal law is intended to be consistent with the bill's purposes and text and the Supremacy Clause of Article VI of the U.S. Constitution.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes to existing law.

DISSENTING VIEWS

This bill voids the amendments to parts 17, 402, and 424 of Title 50, Code of Federal Regulations, made by final rules promulgated by the Secretary of the Interior and the Secretary of Commerce under the Trump Administration. These regulations are discussed in more detail below, but all involve the administration of the Endangered Species Act (ESA). This bill would undermine necessary regulatory progress made by the Trump Administration to provide more transparent and consistent regulations to stakeholders who are constantly navigating hurdles within the law. Interior and Commerce issued these final rules after completing the necessary public review process as required by law and should be applauded for their efforts to provide more regulatory certainty to an otherwise complex and onerous law.

Paragraph 1 voids the final rule promulgated by the Secretary of the Interior entitled “Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants” (84 Fed. Reg. 44753 (August 27, 2019)). This rule involves species-specific ESA section 4(d) rules being issued concurrently with listing or reclassification determinations for threatened species. In an effort to streamline administration of rules, improve efficiency and transparency the rule rescinds the blanket protections of previous regulations in favor of allowing species-specific 4(d) rules concurrently with any listing or reclassification.

Paragraph 2 voids the final rule promulgated by the Secretary of the Interior and the Secretary of Commerce entitled “Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation” (84 Fed. Reg. 44976 (August 27, 2019)). This rule clarifies measures within the ESA section 7 consultation process which regulates interagency cooperation.

Paragraph 3 voids the final rule promulgated by the Secretary of the Interior and the Secretary of Commerce entitled “Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat” (84 Fed. Reg. 45020 (August 27, 2019)). This rule modifies portions of procedures and criteria for listing or delisting animal or plant species as threatened or endangered as well as designating critical habitat.

At a September 24, 2019, Subcommittee on Water, Oceans and Wildlife hearing on the bill, a representative from the U.S. Fish and Wildlife Service testified in opposition to the bill and reiterated the Administration’s commitment to ensuring that “the ESA works for the American people and for the species it protects.” The Administration witness went on to clarify the recently finalized rules “seek to improve implementation of the ESA by increasing transparency and the effectiveness of the law. The rules ensure that delistings are not held to a higher standard than listings, allow a reasonable approach to critical habitat designations, allow eco-

conomic information to be included to increase transparency for the public, allow a tailored approach to get the level of protection for threatened species right, and clarify our regulations for consultations.” The finalized rules are in line with the ultimate goal of the ESA, species recovery. The legislation would gut a noble proposal by the Trump Administration to encourage collaborative conservation actions from a broad range of partners, which would ultimately make the ESA more effective in reaching the fundamental goal of species recovery and eventual return of management of recovered species to the States. The proposed legislation would do nothing but continue to halt the Trump Administration’s progress at making the ESA actually work as intended. For these reasons, many Republicans oppose H.R. 4348.

ROB BISHOP (UT).
LOUIE GOHMERT.
TOM MCCLINTOCK.
PAUL A. GOSAR.

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