

Committee on Natural Resources

Rob Bishop Chairman
Mark-Up Memorandum

September 8, 2017

To: All Natural Resources Committee Members

From: Majority Committee Staff—Melissa Beaumont, Christine Harsha
Subcommittee on Oversight & Investigations (x5-7107)

Mark-up: **H.R. 1274 (Rep. Dan Newhouse)**, To amend the Endangered Species Act of 1973 to require making available to States affected by determinations that species are endangered species or threatened species all data that is the basis of such determinations, and for other purposes.
September 12 & 13, 2017; 1334 Longworth House Office Building

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

Summary of the Bill

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

It also ensures the inclusion of data submitted by State, local, tribal or county governments as part of the ESA’s requirement of the Secretary to use the best available scientific and commercial data when reviewing the status of the species. This legislation is identical to a provision of H.R. 4315 that passed the House in the 113th Congress with bipartisan support.

Cosponsors

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

Background

Section 6 of the Endangered Species Act (ESA) requires federal cooperation with the States “to the maximum extent practicable” in listing decisions, that the federal agencies often duplicate analyses and conservation plans already generated by states, and that data provided by the states is sometimes ignored by the federal agencies in ESA activities.¹ Species listings and critical habitat designations have the potential to impact entire communities, industries, and can place burdens upon state governments. States, tribes, and county governments are well-situated

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

to participate in listing decisions in a meaningful and productive manner. However, in practice, federal cooperation with States, tribes, and local governments does not always occur.

States have testified that the ESA as currently implemented, does not properly honor their ability to participate to the maximum extent practicable in federal ESA listing decisions. States also have stated that they are not made privy to factors utilized by the federal government in listing decisions that impact lands, communities, and species within their borders.²

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

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

Local county governments, particularly those in areas with a significant portion of federally owned lands within their jurisdictional borders, have expressed concerns that federal ESA-implementing agencies often ignore locally generated science and data that they provide to the federal agencies in listing decisions.⁵ In more than one case, a court order has been required to obtain the data from federal officials, even though the data was obtained through taxpayer-funded studies.⁶ In addition, local entities have raised the concern that a key document used by

²See, *The Status of the Federal Government's Management of Wolves: Hearing Before the H. Comm. on Natural Resources*, 114th Cong. (2016) (States were not included in decisions to introduce and manage wolf populations in the Southwest, Mid-Atlantic, West, and Great Lakes regions. Faulty science and implementation caused failure of Red Wolf program in North Carolina).

³See, H.B. 1025, 83rd Legislature (TX 2009) (The Texas Legislature provided \$5 million to the Texas Comptroller's Office to support high-quality species research through state-funded universities and continues to provide funding. This has kept species, such as the Dunes Sagebrush Lizard, off of the Endangered Species List),

<https://comptroller.texas.gov/programs/species-economy/>. See also, Letter from Glenn Hegar, Comptroller, State of Texas to the People of Texas (2017) available at <https://comptroller.texas.gov/programs/species-economy/letter.php>.

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

⁵Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources, 113th Cong. (2013) (written testimony of Tom Jankovsky, Garfield County, Colorado, at 39), which describes Garfield County, Colorado's questioned the accuracy of a map developed by the FWS for sage grouse habitat in Colorado after the federal agency refused its request to verify data used by the U.S. Fish and Wildlife Service federal report.

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

the FWS in its listing determination was an unpublished manuscript that was inaccessible for public review.⁷

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

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

Previous Committee and House Activity and Legislation

On September 21, 2016, the Subcommittee on Oversight and Investigations held a hearing on the federal government’s management of wolves. Witnesses testified on behalf of the States of Idaho, New Mexico, and North Carolina about the failure of the federal government to involve States in federal ESA processes for Mexican Wolves, Gray Wolves, and Red Wolves.¹¹

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

⁸[Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources, 113th Cong. \(2013\) \(written testimony of N. Kathryn Brigham, Columbia River Inter-Tribal Fish Commission, at 17\).](#)

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

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

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

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

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

Recently, on July 19, 2017 the Committee held a legislative hearing on five ESA reform bills that improve implementation of the ESA, including H.R. 1274.¹⁴ During the hearing, witnesses testified to the importance of including state, local, and tribal data in the federal process for making ESA listing decisions.¹⁵ For instance, David Willms, a policy advisor for Wyoming Governor Matt Mead, testified that his office has consistently recommended that federal agencies allow for more consideration of state and local data in listing decisions.¹⁶ He testified that states are continually conducting on the ground research on the native species located within their state and that their hope is "to be able to provide all the data that we might have on a species to better inform decision-making for the agency".¹⁷ Witness Glen Hegar, the Comptroller for the State of Texas, further described in his testimony how "states have the relationships and the infrastructure to work with land owners, communities, and industries, and access to research data, monitoring initiatives, and other resources that can lead to better listing decisions".¹⁸

Rep. Randy Neugebauer (R-TX), introduced H.R. 4317, an identical version of this bill in the 113th Congress and the Committee examined it at an April 8, 2014 legislative hearing.¹⁹ On April 30, 2014, the Committee ordered it favorably reported to the House,²⁰ and on July 29, 2014, this bill was included as section 3 of H.R. 4315, which passed the House by a bipartisan vote of 233-190.

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

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

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

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

¹⁴Legislative Hearing of the Committee on Natural Resources on H.R. 424, H.R. 717, H.R. 1274, H.R. 2603, and H.R. 3131, July 19, 2017, 115th Cong. (2017), at 83.

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.*, at 54-56.

¹⁹H.R. 2352, 114th Cong. (2015), and *Hearing on H.R. 4315, H.R. 4316, H.R. 4317, and H.R. 4318 before the House Comm. on Natural Resources*, 113th Cong. (2014).

²⁰*Markup on H.R. 4315, H.R. 4316, H.R. 4317, and H.R. 4318 Before the House Comm. on Natural Resources*, 113th Cong. (2014).

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

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

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

Cost

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

Administration Position

During the July 19, 2017 legislative hearing held by the Committee, FWS Deputy Director Greg Sheehan testified that he supported the efforts by the Committee to reform the ESA and ultimately improve implementation of ESA and recovery of species.²¹ In the hearing, Sheehan testified that additional sources of data and sound research would assist the agency in making more informed and potentially more expeditious decisions on ESA listings.²²

Effect on Current Law (Ramseyer)

²¹Legislative Hearing of the Committee on Natural Resources on H.R. 424, H.R. 717, H.R. 1274, H.R. 2603, and H.R. 3131, July 19, 2017, 115th Cong. (2017), at 155.

²²*Id.*