

Committee on Natural Resources

Rob Bishop, Chairman
Hearing Memorandum

September 24, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff — Chris Esparza (x67736)

Hearing: Legislative hearing on **H.R. 6356 (Rep. Andy Biggs)**, to amend the Endangered Species Act of 1973 to provide for improved precision in the listing, delisting, and downlisting of endangered species and potentially endangered species.
September 26, 2018, 2:00PM; 1324 Longworth House Office Building.

H.R. 6356 (Rep. Andy Biggs), “Less Imprecision in Species Treatment Act of 2018” or the “LIST Act of 2018”

Summary of the Bill

H.R. 6356 amends the Endangered Species Act (ESA) to authorize the Secretary of the Interior to de-list a species when the Secretary obtains objective, measurable, scientific data demonstrating a species is recovered. Additionally, this legislation would create a mechanism for the U.S. Fish and Wildlife Service (USFWS) to promptly act on information it receives that demonstrates a species was wrongfully listed.

Finally, the bill also prohibits individuals who have been found to have intentionally submitted false or fraudulent species data to petition to list a species as endangered or threatened from submitting further petitions for a period of ten years. This legislation mirrors language from H.R. 3824 which passed the House in the 109th Congress.¹

Cosponsors

[30 Cosponsors](#)

Invited Witnesses (In alphabetical order)

Mr. Robert Dreher
Senior Vice President
Conservation Programs & General Counsel
Defenders of Wildlife

Mr. Jamie Johansson
President

¹ H.R. 3824, 109th Cong., available at <https://www.congress.gov/bill/109th-congress/house-bill/3824?q=%7B%22search%22%3A%5B%22HR+3824%22%5D%7D&r=1>.

California Farm Bureau
Sacramento, CA

Mr. Gregg Renkes
Director
Office of Policy Analysis
U.S. Department of the Interior
Washington, DC

Mr. David Sauter
County Commissioner
Klickitat County
Lyle, WA

Mr. Jonathan Wood
Attorney
Pacific Legal Foundation
Washington, DC

Background

The Endangered Species Act of 1973

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.² The law further requires agencies to take necessary actions to conserve those species and their habitats.³ 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.⁴ 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 1973.⁵

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.⁶ In fact, many of those species were

² 16 U.S.C. 1533.

³ *Id.*

⁴ CONG. RESEARCH SERV., RL31654, THE ENDANGERED SPECIES ACT: A PRIMER 15 (2016).

⁵ 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).

⁶ 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).

delisted after it was discovered that federal agencies used erroneous data in the original listing.⁷ In total, to date there have been 2,421 listings⁸ 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.⁹

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.¹⁰ 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.¹¹

In many cases, implementation of the ESA has caused increased burdens for those living in close proximity to the protected species.¹² 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.¹³ They are eager to stabilize species populations to prevent listings that can have a major economic impact on State and local communities through restrictions on land use.¹⁴ 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.¹⁵

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.¹⁶ ESA modernization should prioritize effective species recovery while maintaining the core principles of the Act.

⁷ 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).

⁸ *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.

⁹ *Supra*, note 6.

¹⁰ 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.

¹¹ 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.

¹² *Supra*, note 9.

¹³ 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.

¹⁴ *Id.*

¹⁵ 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.

¹⁶ 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>.

Section 4 of the ESA outlines the basis for determining when to list, reclassify, or delist a species for ESA protections.¹⁷ Designed to facilitate the recovery of endangered or threatened species, a key component of ESA success involves a species recovery plan.¹⁸ Unfortunately, many listed species today rely on either incomplete, outdated, or no recovery plan at all despite remaining on the list.¹⁹ The lack of complete and accurate recovery plans can subsequently inhibit a proper determination that a species should be reclassified or delisted. Additionally, if and when the determination is made that a species was listed based on incorrect or inaccurate information, the process for correcting this mistake can be long and tedious, draining valuable resources away from other important species recovery endeavors.

To accurately monitor a listed species' progress towards recovery, the ESA requires the appropriate Secretary to "develop and implement plans... for the conservation and survival of endangered species and threatened species" in most cases.²⁰ These plans, commonly known as recovery plans, encourage planning and are meant to serve a critical role in guiding agency decisions.²¹ Outlined in the statute, these recovery plans are meant to incorporate three factors:

- 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.²²

Once a recovery plan has been completed, the ESA further calls for a system to be developed to monitor progress in increments of five years.²³ If completed properly, this system would serve as a tool for monitoring agency success when it comes to protecting and recovering threatened and endangered species. A periodic review of the recovery plan data should also serve as a mechanism for revising outdated information in older recovery plans.

For many ESA-listed species today, listing is where agency involvement seems to end. As of 2016, "a quarter of eligible ESA-listed species...lack[ed] an official recovery plan."²⁴ Without a formal recovery plan, not only is agency planning regarding a species placed in limbo,

¹⁷ ESA 4, 16 U.S.C. 1533.

¹⁸ ESA 4(f), 16 U.S.C. 1533(f); See U.S. Fish and Wildlife Service Endangered Species Program, Delisting A Species (2011). <https://www.fws.gov/endangered/esa-library/pdf/delisting.pdf>.

¹⁹ Malcom JW, Li Y-W. Missing, delayed, and old: The status of ESA recovery plans. Conservation Letter. 2018;e12601. <https://onlinelibrary.wiley.com/doi/epdf/10.1111/conl.12601>.

²⁰ ESA 4(f), 16 U.S.C. 1533(f).

²¹ *Id.* See Malcom JW, Li Y-W. Missing, delayed, and old: The status of ESArecovery plans.Conservation Letter. 2018;e12601. <https://onlinelibrary.wiley.com/doi/epdf/10.1111/conl.12601>.

²² Supra note 4.

²³ ESA 4(g), 16 U.S.C. 1533(g).

²⁴ Supra note 3.

but proper species monitoring cannot occur. Furthermore, for those species with a recovery plan, these plans have a “median age of >20 years…with 10% of plans >31.7 years old.”²⁵ This leaves agencies with outdated information on how to best recover those listed species as not only our knowledge about the species advances but so do changes in threats.

Despite the challenges agencies face when monitoring species recovery, the ESA does allow for outside assistance in evaluating progress. If requested, the Secretary may review submitted data and make a reclassification or delisting determination.²⁶ This process may involve the Secretary evaluating submitted data against a species recovery plan’s goals but can become an exponentially more difficult process if no recovery plan exists in the first place. Even with this mechanism for private monitoring of a species, the lack of a recovery plan, or even an up to date recovery plan, can stymie efforts to reclassify or delist a recovered species.

Agencies face even further strains on resources when attempting to rectify a situation where a species was wrongly listed. A 2014 report found that the “median cost for preparing and publishing a 90-day finding is \$39,276; for a 12-month finding, \$100,690; for a proposed rule with critical habitat, \$345,000; and for a final listing rule with critical habitat, \$305,000.”²⁷ Admittedly, an agency may not know it is incorrectly listing a species at the time information is received. Even if the agency discovers the listing relied on inaccurate or misleading data, there exists a litany of regulatory burdens to quickly correct this mistake.²⁸ In the meantime, landowners and businesses may face fines and penalties, private property owners can see restrictions placed on their lands, and business owners may be subject to heavy burdens.²⁹

Since the process for reclassifying or delisting a species, even if wrongfully listed, faces the same regulatory hurdles and expenses as listing a species in the first place, the process can subject individuals and business to extensive unnecessary burdens.³⁰ Furthermore, because nothing in the ESA addresses wrongfully listed species, once a wrongfully listed species is finally delisted, this species receives the same expensive post listing management a legitimate listed species would receive.³¹ Not only do federal agencies not have the ability to recover the regulatory costs of a wrongfully listed species, they also have no method of preventing fraudulent petitioners if and when they are identified.

H.R. 6356 would create a method for identifying recovered species and either reclassifying or delisting the species. By creating a streamlined pathway towards identifying recovered species, entities may leverage private resources to better monitor and track a listed species’ progress. Furthermore, this legislation ensures that limited conservation resources are directed towards legitimately listed endangered or threatened species by providing a method for identifying wrongfully listed species, providing a streamlined path for delisting, and preventing

²⁵ Id.

²⁶ ESA 4(b)(1)(A), 16 U.S.C. 1533(b)(1)(A).

²⁷ Robert Gordon, Correcting Falsely “Recovered” and Wrongly Listed Species and Increasing Accountability and Transparency in the Endangered Species Program (2018), https://www.heritage.org/sites/default/files/2018-04/BG3300_0.pdf.

²⁸ See id.

²⁹ Id.

³⁰ Id.

³¹ See id; Supra note 11.

valuable funds from being expended on unnecessary monitoring. Finally, the legislation provides a method for identifying fraudulent petitioners and mitigating potential future waste by barring these offenders from submitting future petitions for a period of ten years.

Cost

No current CBO score is available.

Administration Position

No current Administration position is available.

Major Provisions of H.R. 6356

Section 2. Requirement to Initiate Delisting. Section (a) amends section 4 of the ESA to create a new streamlined process by which the Secretary may identify recovered species and either reclassify or delist the species.

Section (b) further amends section 4 of the ESA to create a process for identifying wrongfully listed species and streamlining the delisting process once these species are identified. This section also provides the Secretary of the Interior a process for prohibiting fraudulent petitioners from submitting future petitions to the Department for a period of ten years.

Section 3. Expanded Consideration During Five-Year Review. This section amends section 4 of the ESA to outline specific criteria which must be considered during a listed species' five-year review.

Effect on Current Law (Ramseyer)

Showing Current Law as Amended by H.R. 6356

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

Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)

Section 4 (16 U.S.C. 1533)

§1533. Determination of endangered species and threatened species

* * * * *

(b) Basis for determinations

* * * * *

(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, 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 this chapter 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 7¹ 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, 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.

(H)(i) Not later than 90 days after the date the Department of the Interior receives or produces under this subsection information described in clause (ii) regarding a species included in a list under subsection (c), the Secretary shall to the maximum extent practicable find whether the inclusion of such species in such list was less than likely to have occurred in the absence of the scientific or commercial information referred to in clause (ii).

(ii) Information referred to in clause (i) is any information demonstrating that the listing was determined on the basis of scientific or commercial information available to, or received or produced by, the Department under paragraphs (1) and (3) of subsection (b) that at the time the scientific or commercial information was available to or received or produced by the Department it was-

- (I) inaccurate beyond scientifically reasonable margins of error;
- (II) fraudulent; or
- (III) misrepresentative.

(iii) Notwithstanding the requirement under subsection (c)(2)(B) that each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b), the Secretary shall--

(I) remove from any list published under subsection (c) any species for which a positive finding is made under clause (i); and

(II) promptly publish in the Federal Register notice of such finding that includes such information as was received or produced by the Department under such clause.

(iv) Any positive finding by the Secretary under clause (i) shall not be subject to judicial review.

(v) Any negative finding by the Secretary under clause (i) shall be subject to judicial review.

(vi) In the case of a species removed under clause (iii) from a list, the publication and notice under subsection (b)(5) shall consist solely of a notice of such removal.

(vii) If the Secretary finds that a person submitted a petition that is the subject of a positive finding under clause (i) knowing that it contained scientific or commercial information described in clause (ii), then during the 10-year period beginning on the date of the finding under this clause the person shall not be considered an interested person for purposes of subparagraph (A) with respect to any petition submitted by the person after the date the person submitted such scientific or commercial information.

* * * * *

(9)(A) The Secretary shall initiate the procedures in accordance with subsection (a)(1) to remove a species from a list published under subsection (c) if--

(i) the goals of a recovery plan for the species developed under subsection (f) have been met; or

(ii) the goals for recovery of the species have not been developed under subsection (f), and the Secretary determines that the species has recovered sufficiently to no longer require the protection of the Act.

(B) Notwithstanding the requirement of subsection (c)(2) that each determination under subparagraph (B) of that subsection shall be made in accordance with the provisions of subsections (a) and (b), the Secretary shall remove a species from any list published under subsection (c) if the Department of the Interior has produced or received substantial scientific or commercial information demonstrating that the species is recovered or that recovery goals set for the species under subsection (f) have been met.

(C) In the case of a species removed under subparagraph (A) from a list published under subsection (c), the publication and notice under subsection (b)(5) shall consist solely of a notice of such removal.

(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 each 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 subsections (a) and (b).

(3) Each determination under paragraph (2)(B) shall consider one of the following:

(A) Except as provided in subparagraph (B) of this paragraph, the criteria required under subsection (f)(1)(B) in the recovery plan for the species.

(B) If the objective, measurable criteria under subsection (f)(1)(B)(ii) are not established, the factors for the determination that a species is an endangered species or a threatened species set forth in subsections (a)(1) and (b)(1).

(C) A finding of error in the determination that the species is an endangered species, a threatened species, or extinct.

(D) A determination that the species is no longer an endangered species or threatened species or in danger of extinction, based on an analysis of the factors that are the basis for listing in subsections (a)(1) and (b)(1).

