

Committee on Natural Resources
Rob Bishop, Chairman
Hearing Memorandum

September 24, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff — John Strom (x5-7107)

Hearing: Legislative hearing on **H.R. 6360 (Rep. Ralph Norman)**, To amend the Endangered Species Act of 1973 to provide for greater certainty and improved planning for incidental take permit holders.
September 26, 2018, 2:00PM; 1324 Longworth House Office Building.

H.R. 6360 (Rep. Ralph Norman), “Permit Reassurances Enabling Direct Improvements for Conservation, Tenants, and Species Act of 2018” or the “PREDICTS Act of 2018”

Bill Summary

H.R. 6360 codifies the Clinton Administration’s 1998 “No Surprises” rule¹ to provide certainty for property owners and to reward private and public entities that uphold land management agreements designed to facilitate species preservation and recovery.

Prior to the “No Surprises” rule, landowners were hesitant to enter into agreements to manage their lands for the benefit of listed or candidate species for fear that the federal government could impose future additional regulations. To provide landowners with greater certainty that they will not be punished for engaging in cooperative conservation, H.R. 6360 codifies key aspects of the successful “No Surprises” rule, as well as current regulations governing Candidate Conservation Agreements with Assurances (CCAA) and Safe Harbor Agreements (SHA).

Cosponsors

[22 Cosponsors](#)

Invited Witnesses (In alphabetical order)

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

Mr. Jamie Johansson
President
California Farm Bureau

¹ 50 C.F.R. 17.22.

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

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).

the list of endangered and threatened species.⁶ In fact, many of those species were 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

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).

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.

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

Incidental Take Permits

In 1982 Congress amended the ESA by creating a mechanism under section 10(a)(1)(B) that authorizes FWS and NMFS to issue permits to non-federal entities for the "incidental take" (ITP) of endangered and threatened wildlife species.¹⁷ ITPs allow non-federal landowners to proceed with an activity that is legal in all other respects, but that results in the "incidental" taking of a listed species.¹⁸ "Take" is broadly defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."¹⁹ Penalties for taking an endangered or threatened species without a permit are harsh, including fines ranging from \$5,000 to \$50,000 and up to one year imprisonment.²⁰

Habitat Conservation Plans and the "No Surprises" Rule

To secure an ITP, landowners must create a Habitat Conservation Plan (HCP) that mitigates impacts to listed species.²¹ An HCP specifies, among other things, the impact of the take, measures that will minimize the impact, alternative actions, and any other measures required by the Secretaries.²² HCPs must be approved by the Secretary of the Interior and the public is provided with a comment period prior to the HCP being approved.²³ HCPs must contain monitoring and funding provisions.²⁴ In addition, HCPs must have an adaptive management program to address reasonably foreseeable changes in circumstances.²⁵

HCPs represent a significant commitment of resources on the part of landowners and developers. They can take years to negotiate with the Secretaries and can cost millions of dollars.²⁶ Prior to the adoption of the "No Surprises" rule, only 14 ITPs were issued between 1982 and 1992²⁷ as landowners "feared being informed at a later date that despite their earlier good-faith conservation efforts, the demand for additional protection measures for species would halt planned development and land use or result in additional restrictions and require more private funding."²⁸

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>.

¹⁷ Endangered Species Act Amendments of 1982, Pub. L. No. 97-304.

¹⁸ 16 U.S.C. § 1539(a)(1)(B).

¹⁹ 16 U.S.C. § 1532(19).

²⁰ 16 U.S.C. § 1540(b).

²¹ 16 U.S.C. § 1539(a)(2); see also 50 CFR § 17.22(b).

²² *Id.*

²³ *Id.*; see also 50 CFR § 17.22(e).

²⁴ 50 CFR § 17.22(b).

²⁵ *Id.*

²⁶ Lessons Learned From Habitat Conservation Plans: Applications For Wind And Endangered Species, NATIONAL WIND COORDINATING COLLABORATIVE, https://www.nationalwind.org/wpcontent/uploads/assets/research_meetings/Research_Meeting_VIII_Oller.pdf (last visited Sept. 19, 2019).

²⁷ *Spirit of the Sage Council v. Norton*, 294 F. Supp. 2d 67, 79 (D.D.C. 2003)

²⁸ Press Release, Office of the Secretary, Department of the Interior, Administration's New Assurance Policy Tells Landowners: "No Surprises" in Endangered Species Planning (Aug. 11, 1994) (available at <https://www.fws.gov/news/Historic/NewsReleases/1994/19940811.pdf>).

First proposed in 1994, the “No Surprises” rule gives assurances to non-federal landowners that if “unforeseen circumstances” arise, the government will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed to in the HCP without the consent of the landowner.²⁹ These assurances are predicated on the landowner adhering to the HCP’s terms.³⁰ Following the adoption of the “No Surprises” rule, the Secretaries issued 840 ITPs with “No Surprises” assurances and have approved over 686 HCPs.³¹

Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, and Safe Harbor Agreements

The success of HCPs has pushed the Secretaries to adopt other collaborative conservation mechanisms for species that are candidates for listing under the ESA, but whose listing is precluded by higher priority listing activities. These candidate species and their habitats are not subject to ESA restrictions, but landowners risk becoming subject to ESA provisions if the species continues to decline. Candidate Conservation Agreements (CCA) and Candidate Conservation Agreements with Assurances (CCAA) are two kinds of formal, voluntary agreements that non-federal landowners and the Secretaries can use to address the conservation needs of one or more candidate species or species likely to become candidates in the near future.³²

Participants in CCAs and CCAAs voluntarily commit to implement specific actions designed to reduce threats to specified species, so that listing may not be necessary.³³ The degree of detail of the agreements vary widely, and there are no specific assurances associated with them. Like an HCP, a CCAA provides landowners with a permit containing assurances that if they engage in the agreed-to conservation actions, they will not be required to implement additional conservation measures if the species is listed, unless they consent to such changes.³⁴ The Secretaries can only enter into a CCAA if they determine that the conservation measures in the agreement provide a conservation benefit to the covered species.³⁵

Safe Harbor Agreements (SHA) are voluntary conservation arrangements between the Secretaries and non-federal landowners where a landowner agrees to undertake certain actions that the Secretaries determine will contribute to the recovery of a listed species.³⁶ In exchange, the non-federal landowner receives formal assurances from the Secretaries that if he or she fulfills the SHA, the Secretaries will not impose any additional or different management requirements without

²⁹ U.S. FISH AND WILDLIFE SERVICE, HABITAT CONSERVATION PLANS UNDER THE ENDANGERED SPECIES ACT, U.S. DEP’T, OF THE INTERIOR 3 (Apr. 2011) (available at <https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>).

³⁰ *Id.*

³¹ U.S. FISH AND WILDLIFE SERVICE, ENVIRONMENTAL CONSERVATION ONLINE SYSTEM: HABITAT CONSERVATION PLANS, U.S. DEP’T, OF THE INTERIOR (2018) (available at <https://ecos.fws.gov/ecp0/conservationPlan/region/summary?region=9&type=HCP>).

³² 50 CFR § 17.22(d).

³³ U.S. FISH AND WILDLIFE SERVICE, CANDIDATE CONSERVATION AGREEMENTS, U.S. DEP’T, OF THE INTERIOR (Oct. 2017) (available at <https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>).

³⁴ *Id.*

³⁵ *Id.*

³⁶ 50 CFR 17.22(c).

the landowner's consent. In addition, at the end of the agreement period, participants may return the enrolled property to the baseline conditions that existed at the beginning of the SHA.³⁷

Major Provisions of H.R. 6360

Section 2. Codification of the “No Surprises” Regulations. Codifies key aspects of the existing “No Surprises” rule, such as defining terms like “unforeseen circumstances.” It also codifies the assurances provided to landowners who enter into to CCAAs and SHAs with the Secretaries.

Section 3. Candidate Conservation Agreements with Assurances. Codifies many of the existing practices for developing and entering into CCAAs, including the criteria for approval and the assurances provided to participating landowners.

Section 4. Safe Harbor Agreements. Codifies important elements of the regulations governing SHAs. This includes requiring that the landowner and relevant Secretary jointly determine the baseline requirements of the SHA to ensure that “the agreement will, at a minimum, maintain existing conditions for the species covered by the agreement.”

Section 5. Financial Assistance. Provides financial assistance to private landowners in the form of a grant from the Secretary of the Interior of up to \$10,000 to assist the landowner in carrying out a CCAA or SHA. The funding may not be used for any action required by a permit, CCAA, or SHA. These grants are offered in addition to, and do not affect, the total amount of payments that a landowner is eligible to receive under federal law.

Cost

The Congressional Budget Office has yet completed a cost estimate of this bill.

Administration Position

No Administration position is available at this time.

[Effect on Current Law \(Ramseyer\)](#)

³⁷ U.S. FISH AND WILDLIFE SERVICE, SAFE HARBOR AGREEMENTS FOR PRIVATE LANDOWNERS, U.S. DEP'T, OF THE INTERIOR (Oct. 2017) (available at <https://www.fws.gov/endangered/esa-library/pdf/harborqa.pdf>).