To amend the Endangered Species Act of 1973 to define petition backlogs and provide expedited means for discharging petitions during such a backlog.

IN THE HOUSE OF REPRESENTATIVES

Mr. Westerman introduced the following bill; which was referred to the Committee on ____________________________

A BILL

To amend the Endangered Species Act of 1973 to define petition backlogs and provide expedited means for discharging petitions during such a backlog.

1 Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Providing ESA Timing Improvements That Increase Opportunities for Nonlisting Act of 2018” or the “PETITION Act of 2018”.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds the following:
(1) The number and type of species-listing petitions received by the United States Fish and Wildlife Service (in this Act referred to as the “Service”) during the last two decades under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) routinely outstrip the capacity of the agency to process all such petitions within the timeframes required by that statute, constituting a petition backlog.

(2) A significant portion of petitions in the backlog would ultimately be rejected as having failed to contain substantial information, or containing substantial information but not meriting a listing of a species as an endangered species or threatened species, if the Service were to issue findings on them.

(3) The petition system has been overloaded with influxes of petitions submitted by well-funded petitioners with the express intention of creating a backlog that causes the Service to fail to adhere to timeframes established in the Endangered Species Act of 1973.

(4) The deficit between total received petitions and petitions processed within statutory timeframes results in the Federal Government being exposed to
legal liability on the basis of such a backlog, in accordance with such intention of petitioners.

(5) Ensuing litigation initiated by such petitioners results in the Service agreeing to or being court-ordered to adhere to adverse timeframes, listing decisions, and settlements.

(6) Such litigation secures listings for species and habitat designations for which the Service would otherwise not issue a positive finding on the basis of its regular, procedural evaluation of a petition.

(7) Accordingly, such listings and designations are agreed or adhered to contrary to the public interest insofar as the public benefits from faithful execution of duly passed laws.

(8) A statutory remedy is necessary to address the backlog of the Service and to prevent such statutory abuse while maintaining proper open channels for qualifying species to be listed as threatened species or endangered species.

(b) PURPOSES.—The purposes of this Act are the following:

(1) To maintain safeguards and pathways to listing of species as endangered species or threatened species, along with all corresponding protections thereof, for any imperiled species.

(3) To prevent adverse court orders and settlements arising when such liability is exploited in litigation.

(4) To accomplish all of the foregoing by reducing and eliminating the backlog of excess petitions received by the Service under the Endangered Species Act of 1973.

SEC. 3. DEFINITIONS.

Section 2 of the Endangered Species Act of 1973 (16 U.S.C. 1531) is amended—

(1) by inserting before the text the following:

“(a) In General.—”;

(2) by adding at the end the following:

“(b) Definitions Related to Petitions.—In this Act:

“(1) 90-day petition backlog.—The term ‘90-day petition backlog’ means such a backlog declared by the Secretary under section 4(b)(3)(E).

“(2) 12-month petition backlog.—The term ‘12-month petition backlog’ means such a backlog declared by the Secretary under section 4(b)(3)(E).
“(3) BACKLOG SCHEDULE.—The term ‘backlog schedule’ means a comprehensive, regularly updated compendium of petitioned-for species that are the subject of a 90-day petition backlog or a 12-month petition backlog—

“(A) that consists of—

“(i) a list of petitions to add a species to a list of species under section 4(c), including petitions to move a species from the list of threatened species to the list of endangered species; and

“(ii) a list of petitions to remove a species from a list of species under section 4(c), including petitions to move a species from the list of endangered species to the list of threatened species; and

“(B) in which the petitions in each such list appear in the order in which the petitions were submitted to the Secretary.

“(4) BACKLOG PROCEDURES.—The term ‘backlog procedures’ means the actions taken by the Secretary—

“(A) under section 4(b)(3)(G) following the declaration of a 90-day petition backlog; or
“(B) under section 4(b)(3)(H) following the declaration of a 12-month petition backlog.

“(5) PETITIONED-FOR SPECIES.—The term ‘petitioned-for species’ means a species that has been identified in a petition presented under subparagraph (A) or (B) of section 4(b)(3).”.

SEC. 4. BACKLOG DECLARATION AND PROCEDURES.

(a) IN GENERAL.—Section 4(b)(3) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(3)) is amended by adding at the end the following:

“(E)(i) The Secretary shall—

“(I) declare a 90-day petition backlog at any time the total number of species for which a petition is presented to the Secretary under subparagraph (A) that has not been the subject of a finding by the Secretary within the timeframe established under such subparagraph exceeds 5 percent of the number of species for which such petitions have been presented during the preceding 15 years;

“(II) submit a backlog schedule for such backlog to—

“(aa) the President;
“(bb) the Chairman and ranking minority Member of the Committee on Environment and Public Works of the Senate; and

“(cc) the Chairman and ranking minority Member of the Committee on Natural Resources of the House of Representatives; and

“(III) comply with backlog procedures under subparagraph (G) during the period such backlog is in effect.

“(ii) The Secretary shall—

“(I) declare a 12-month petition backlog at any time the total number of species for which a petition is being considered by the Secretary under subparagraph (B) that has not been the subject of a finding by the Secretary within the timeframe established under such subparagraph exceeds 5 percent of the number of species for which such petitions have been presented during the preceding 15 years;

“(II) submit a backlog schedule for such backlog to—

“(aa) the President;
“(bb) the Chairman and ranking minority Member of the Committee on Environment and Public Works of the Senate; and

“(cc) the Chairman and ranking minority Member of the Committee on Natural Resources of the House of Representatives; and

“(III) comply with backlog procedures under subparagraph (II) during the period such declaration is in effect.

“(iii) Not later than 90 days after declaring a 90-day petition backlog or 12-month petition backlog, and every 90 days thereafter during the period such backlog is in effect, the Secretary shall submit to the recipients under clause (ii)(II) and (iii)(II), respectively, an updated backlog schedule that contains—

“(I) a list of petitioned-for species for which a finding had been made since the last submission of the backlog schedule under such clause;

“(II) the outcomes of findings for all petitioned-for species for which a finding has been made since the last submission of
the backlog schedule under such clause;
and

“(III) a summary of the bases of all findings for any petitioned-for species for which a finding has been made since the preceding submission of the backlog.

“(F) The Secretary shall terminate a 90-day petition backlog or 12-month petition backlog at such time as the requirements for declaring such backlog under subparagraph (E)(i) or (E)(ii), respectively, are not fulfilled.

“(G) During the effective period of a 90-day petition backlog—

“(i) the requirement under subparagraph (A) to make a finding within 90 days shall not apply with respect to any species that is the subject of a petition included in the list under section 2(b)(3)(A)(i);

“(ii) except as provided in clause (iii), the Secretary shall not make any finding under subparagraph (A) with respect to any species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule, until the earlier of—
“(I) the date the Secretary terminates the backlog under subparagraph (F);

“(II) the date the applicable backlog schedule consists of only the list under such section; or

“(III) the date the only petitioned-for species in the backlog schedule to which the Secretary has not devoted sufficient resources so as to issue such a finding within 90 days are those in the list under such section; and

“(iii) the Secretary is deemed to have made finding under subparagraph (A) that each petition for a species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule does not present substantial scientific or commercial information indicating that the petitioned action may be warranted, effective upon the expiration of the 180-day period beginning on the date the petition was submitted.

“(H) Except as provided in subparagraph (I)—
“(i) after declaring a 12-month petition backlog under subparagraph (E)(ii) and before taking any actions under clause (ii) of this subparagraph, the Secretary shall assign each petition and petitioned-for species to be considered under such clause to one of the five priority bins referred to in the notice issued by the United States Fish and Wildlife Service entitled ‘Methodology for Prioritizing Status Reviews and Accompanying 12-month findings on Petitions for Listing Under the Endangered Species Act (81 Fed. Reg. 49248 (July 27, 2016))’; and

“(ii) during the effective period of such 12-month petition backlog under subparagraph (E)(ii)—

“(I) the requirement under subparagraph (B) to make a finding within 12 months shall not apply with respect to any species that is the subject of a petition included in the list under section 2(b)(3)(A)(i);

“(II) the Secretary shall consider under this paragraph only petitions...
for species included in the list under section 2(b)(3)(A)(ii) in the applicable backlog schedule, that were submitted more than 12 months before the establishment of the backlog;

“(III) except as provided in subclause (IV), the Secretary shall not make any finding under subparagraph (B) with respect to any species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule, until the earlier of—

“(aa) the date the Secretary terminates the backlog under subparagraph (F);

“(bb) the date the applicable backlog schedule consists of only the list under such section; or

“(cc) the date the only petitioned-for species in the backlog schedule to which the Secretary has not devoted sufficient resources so as to issue such a finding within 12 months are
those in the list under such section; and

“(IV) the Secretary is deemed to have made a finding under subparagraph (B)(i) for each species included in the list under section 2(b)(3)(A)(i) that the petitioned action is not warranted—

“(aa) effective upon the expiration of the 18-month period beginning on the date the petition was submitted, if the Secretary has not assigned the species to the ‘Highest Priority—Critically Imperiled’, ‘Strong Data Already Available on Status’ priority bin or ‘New Science Underway to Inform Key Uncertainties’ priority bin referred to in the notice referred to in clause (i); or

“(bb) effective upon the expiration of the 24-month period beginning on the date the petition was submitted, if the Sec-
Secretary has assigned the species to
the ‘Strong Data Already Available on Status’ priority bin or
‘New Science Underway to Inform Key Uncertainties’ priority
bin referred to in the notice referred to in clause (i).

“(I)(i) In the case of the first 12-month petition backlog under subparagraph (E)(ii)—

“(I) item (aa) of subparagraph (H)(ii)(IV) shall be applied by substituting
‘30-month’ for ‘18-month’; and

“(II) item (bb) of subparagraph (H)(ii)(IV) shall be applied by substituting
‘36-month’ for ‘24-month’.

“(ii) The Secretary may not under subparagraph (H)(i) change the assignment of a
petition or petitioned-for species from one priority bin to another priority bin.

“(J) In the case of findings under subparagraph (G)(iii) and (H)(ii)(IV), the publication
under subparagraph (A) or (B)(i), respectively, may consist solely of a notice of each
finding.
“(K)(i) Except as otherwise provided in this Act, the Secretary shall regularly maintain on the internet site of the United States Fish and Wildlife Service a publically available database of petitions referred to in this paragraph and species otherwise evaluated under subsection (a).

“(ii) The database shall contain information about each petitioned-for species including—

“(I) the date a petition for such species was submitted;

“(II) the person who submitted the petition;

“(III) the current status of the petition within the statutory and agency process, including the most recent agency action taken;

“(IV) a web link to any documents received under this paragraph that constituted the petition for such species;

“(V) a web link to any materials the Secretary has received from State or local governments pertaining to petitions to list such species; and
“(VI) the outcomes of all prior petitioning or listing procedures for such species;

“(VII) the outcomes of all prior litigation against the Federal Government on the basis of a petition for or listing of such species, including actions or agreements by the Federal Government to—

“(aa) dispense monies to litigating parties or counsel;

“(bb) promulgate rules as a direct or indirect result of litigation outcomes or agreements;

“(cc) resolve any matter related to the petition or a petitioned-for species by a certain date, or otherwise;

“(dd) conduct further research or analysis related to the petition or petitioned-for species; or

“(ee) engage in any other activity as a result of the terms of litigation settlements or court-orders related to such petitions or petitioned-for species.
“(L)(i) Except as provided in clauses (ii) and (iii), any negative finding described in subparagraph (A) and any finding described in clause (i) or (ii) of subparagraph (B) shall be subject to judicial review.

“(ii) A petition in the list under section 2(a)(3)(A)(i) of the backlog schedule for a 12-month petition backlog is not subject to judicial review—

“(I) on the basis of a negative finding by the Secretary under subparagraph (H)(ii)(IV); or

“(II) on the basis that the Secretary has failed to make a finding within the 12-month timeframe established under subparagraph (B).

“(iii) Notwithstanding subparagraph (C)(ii), a finding by the Secretary under subparagraph (G)(iii), and any failure by the Secretary in the effective period of a 90-day petition backlog to make a finding under subparagraph (A) with respect to any species included in the list under section 2(b)(3)(A)(i) in the applicable backlog schedule, is not subject to judicial review.”.
(b) CONFORMING AMENDMENT.—Section 4(b)(3)(C) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(3)(C)) is amended—

(1) by striking clause (ii); and

(2) by redesignating clause (iii) as clause (ii).