

Committee on Natural Resources

Rob Bishop, Chairman
Markup Memorandum

September 25, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff — Chris Esparza (x67736)

Markup: **H.R. 6355 (Rep. Bruce Westerman)**, to amend the Endangered Species Act of 1973 to define petition backlogs and provide expedited means for discharging petitions during such a backlog.
September 27, 2018, 10:15 a.m.; 1324 Longworth House Office Building.

H.R. 6355 (Rep. Bruce Westerman), “Providing ESA Timing Improvements That Increase Opportunities for Nonlisting Act of 2018” or the “PETITION Act of 2018”

Summary of the Bill

H.R. 6355, introduced by Rep. Bruce Westerman (R-AR-04) on July 12, 2018, amends the Endangered Species Act to authorize the Secretary of the Interior to declare a petition backlog when frivolous petitions overburden the scientific review and evaluation process. It also ensures all necessary protections for legitimate species listing requests, which contain sufficient duly collected scientific information, remain in place. Finally, this legislation would create a public database of listing petitions and accompanying information.

Cosponsors

[20 Cosponsors](#)

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.¹ The law further requires agencies to take necessary actions to conserve those species and their habitats.² 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.³ Congress made its most significant

¹ 16 U.S.C. 1533.

² *Id.*

³ CONG. RESEARCH SERV., RL31654, THE ENDANGERED SPECIES ACT: A PRIMER 15 (2016).

amendments to ESA in 1978, 1982, and 1988, although the overall framework has remained essentially unchanged since its original enactment in 1973.⁴

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.⁵ In fact, many of those species were delisted after it was discovered that federal agencies used erroneous data in the original listing.⁶ In total, to date there have been 2,421 listings⁷ 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.⁸

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.⁹ 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.¹⁰

In many cases, implementation of the ESA has caused increased burdens for those living in close proximity to the protected species.¹¹ 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.¹² 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.¹³ Yet, too often federal management of threatened and endangered species fails to take

⁴ 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).

⁵ 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).

⁶ 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).

⁷ *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.

⁸ *Supra*, note 6.

⁹ 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.

¹⁰ *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.

¹¹ *Supra*, note 9.

¹² *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.

¹³ *Id.*

advantage of the wealth of knowledge of State and local officials and of the successful conservation measures implemented by States.¹⁴

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.¹⁵ ESA modernization should prioritize effective species recovery while maintaining the core principles of the Act.

H.R. 6355

Section 4 of the Endangered Species Act outlines specific timelines which must be met when the relevant Secretary receives a petition to list a species for protection under the ESA.¹⁶ These timelines bind the Secretary when making an initial determination whether the petition presents substantial information to warrant agency action, whether that agency action should proceed with delisting, when designating critical habitat for a listed species, and when conducting a five-year review of a protected species.¹⁷ If a specific timeline is not met, any person or entity may file a lawsuit to compel Secretarial action.¹⁸ With no legal defense for missing a statutory deadline, the Secretary is forced to shift valuable conservation resources when responding to a growing number of petitions, rather than adequately accomplish all his or her ESA section 4 duties.¹⁹

¹⁴ 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.

¹⁵ 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>.

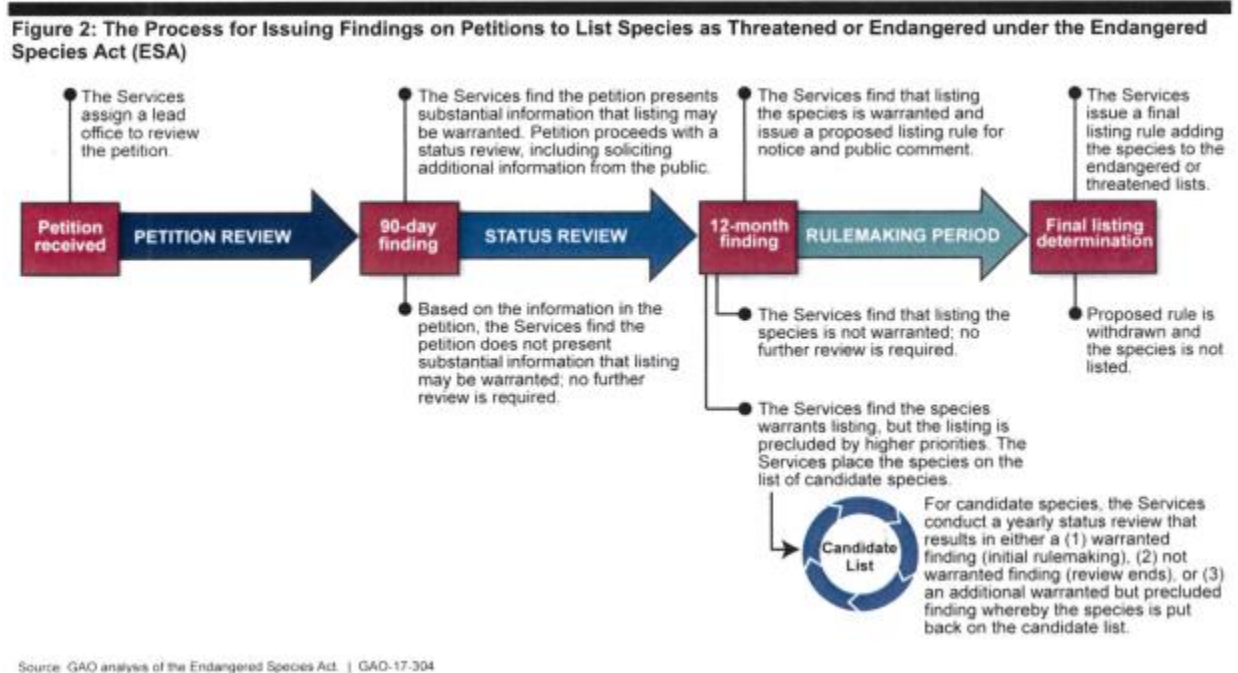
¹⁶ 16 U.S.C. 1533; The Secretaries may also initiate a review to determine if the listing or delisting of a species may be warranted. In addition, the Secretaries may initiate, or a petition can request, a review to determine if the status of a listed species should be reclassified from either endangered to threatened (downlisted) or threatened to endangered (uplisted).

¹⁷ 16 U.S.C. 1533(b)(3).

¹⁸ 16 U.S.C. 1540(g).

¹⁹ The FWS and NMFS' ESA section 4 programs encompass all actions related to listing species as threatened or endangered, including making findings on petitions to add, remove, or reclassify species from either of these lists (16 U.S.C. § 1533(b)(3)); designating and revising critical habitat (16 U.S.C. § 1533(a)(3)); and conducting 5-year status reviews of listed species (16 U.S.C. § 1533(c)(2)(A)).

The process to list a species may begin in either one of two ways: through a petition submitted to the Secretary or through a review initiated by the Secretary.²⁰ When a petition to list a species is submitted, the Secretary must then follow a multi-step process to determine whether a species listing is warranted.²¹ This multi-step process is outlined in the figure below.²²



²⁰ Supra note 2.

²¹ Id.

²² U.S. Gen. Accounting Office, GAO-17-304, *Environmental Litigation: Information on Endangered Species Act Deadline Suits* (2018).

This multi-step process is further governed by statutory deadlines placed on the Secretaries, ranging from the 90-day initial response deadline to the 12-month final determination deadline.²³

Table 1: Endangered Species Act Section 4 Actions with Statutory Deadlines		
Section 4 Action	Description	Statutory Deadline
Listing and delisting		
90-day finding on a listing or delisting petition	The U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) shall make a finding as to whether the petition presents substantial information that the petitioned action may be warranted.	90-days from receipt of petition (to the maximum extent practicable).
12-month finding on a listing or delisting petition	The Services conduct a status review using best available scientific and commercial data to determine whether the petitioned action is warranted, not warranted, or warranted but precluded by other higher priority listing actions.	12-months from receipt of petition.
Final determination on a proposed rule to list or delist species	When the Services issue a 12-month finding that a petitioned action to list or delist a species is warranted, they are to promptly publish a proposed rule in the <i>Federal Register</i> for notice and comment and to solicit additional information. Then, a determination is made whether to issue a final rule implementing the proposed action, to withdrawal the proposed rule, or a notice to extend the review for additional information collection.	1 year from publication of proposed rule. If substantial disagreement exists regarding the sufficiency or accuracy of available data, the deadline may be extended by up to 6 months to obtain additional data.
Critical habitat		
90-day finding on a petition to revise critical habitat	The Services shall make a finding as to whether a petition to revise a critical habitat designation presents substantial information that the requested action may be warranted.	90-days from receipt of petition (to the maximum extent practicable).
12-month finding on a petition to revise critical habitat	If the petition presents substantial information indicating that the requested revision may be warranted, the Services shall issue a notice of how they intend to proceed on the requested revision.	12-months from receipt of petition.
Final determination on a proposed rule to revise critical habitat	If the Services proceed with a proposed rule to revise critical habitat, then they are to publish it in the <i>Federal Register</i> for notice and comment and to solicit additional information. Then, a determination is made whether to issue a final rule implementing the proposed revision, to withdrawal the proposed rule, or a notice to extend the review for additional information collection.	1 year from publication of proposed rule. If substantial disagreement exists regarding the sufficiency or accuracy of available data, the deadline may be extended by up to 6 months to obtain additional data.
Critical habitat determination	Critical habitat is to be designated to the maximum extent prudent and determinable concurrently with the final rule to list a species.	Final rule issued within 12-months of proposed rule. If critical habitat is not determinable at the time the species is listed, the designation can be extended for not more than one additional year from issuance of the final listing rule.
5-year status review		
5-year status review	The Services shall conduct a review of all listed species to determine whether any such species should be removed from the list or whether a change should be made in the species' listing status.	At least once every 5 years.

Source: GAO analysis of the Endangered Species Act. | GAO-17-304

Over the past couple of decades, a high volume of petitions has prevented the Secretaries from adequately carrying out their ESA section 4 duties.²⁴ For example, between fiscal years

²³ Supra note 2.

²⁴ U.S. Fish and Wildlife Service, *Managing the U.S. Fish and Wildlife Service's Endangered Species Act Listing Program, Response to House Report 111-180, A Directive by the Committee on Appropriations to Review the Process for Determining the Status of Species* (May 2010). See also Benjamin Jesup, *Endless War or End This War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multi-District Litigation Settlements*, Vt. J. Env. L., 327 (2013).

2005 and 2015, the Secretaries received 170 petitions to list 1,446 species.²⁵ Without the ability to postpone action on petitions and faced with statutory deadlines for responding to each petition, the Secretaries have faced a high volume of litigation impacting valuable conservation resources.²⁶

An even greater issue is the weaponization of these deadlines by some outside groups and individuals to force the Secretaries' hands. On average, about 13 deadline suits were filed against the Secretaries for failure to comply with the statutory deadlines.²⁷ Two environmental groups, the Center for Biological Diversity and WildEarth Guardians, filed more than half of the lawsuits between 2005 and 2015. A breakdown of the number and type of section 4 actions involving deadline suits is outlined in the table below.²⁸

Table 2: Number and Type of Section 4 Actions Involved in Endangered Species Act Deadline Suits, Fiscal Years 2005-2015

Fiscal year	90-day finding on listing petition	12-month finding on listing petition	90-day or 12-month finding on delisting petition	Final listing determination	Critical habitat designation or revision	5-year status review	Total
2005	5	1	0	12	15	194	227
2006	29	4	0	1	1	90	125
2007	0	1	1	0	7	3	12
2008	5	12	1	1	8	1	28
2009	702	6	3	7	1	1	720
2010	155	112	3	10	50	1	331
2011	1	84	2	0	1	6	94
2012	2	20	1	1	0	1	25
2013	2	18	15	0	2	0	37
2014	1	52	1	0	5	0	59
2015	0	13	2	0	0	0	15
Total	902	323	29	32	90	297	1,673

Source: GAO analysis of legal information obtained from the Department of Justice and the federal online database Public Access to Court Electronic Records (PACER). | GAO-17-304

When a suit is brought against the Secretaries for failure to meet the statutory deadlines, most of these suits are resolved through settlement agreements.²⁹ With no legal defense for missing a deadline, the Secretaries often enter into settlement agreements under which they must prioritize petitions which are the subject of a suit.³⁰ With such a high volume of petitions and ever-increasing litigation, the Secretaries faces a situation where nearly all petitions become subject to immediate prioritization, and resources are devoted fully to responses rather than other ESA section 4 activities such as habitat planning. Growing litigation continues “tying up agency

²⁵ Supra note 6.

²⁶ Supra note 9.

²⁷ Supra note 6.

²⁸ Id.

²⁹ Id.

³⁰ Id.; See also Allison Winter, Patrick Reis & E&E, ENDANGERED SPECIES: Obama admin confronts 'candidate species' backlog E&E News (2009), <https://www.eenews.net/stories/81931>.

resources and leaving little money to address new species petitions and tackle the candidate backlog” for petitions not the subject of a settlement agreement.³¹

H.R. 6355, the PETITION Act, would create a method for the Secretaries to manage a growing number of petitions to list while discouraging those seeking to weaponize the process. The legislation allows for the relevant Secretary to declare a petition backlog at different points throughout the petition process when there exists such an excess number of submitted petitions that the Secretary would surely face yet another lawsuit. This petition backlog declaration would trigger a process by which the Secretary could take additional time to prioritize and work through submitted petitions. Additionally, the process would allow for a more rapid disposal of frivolous petitions, discouraging those seeking to set the stage for a lawsuit by drowning the Secretary in frivolous petitions.

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

Section 1. Short Title. The bill may be cited as the “Providing ESA Timing Improvements That Increase Opportunities for Nonlisting Act of 2018” or the “PETITION Act of 2018.”

Section 2. Findings and Purposes. This section outlines Congressional findings and purposes of this Act.

Section 3. Definitions. This section amends section 2 of the ESA to define additional terms used by this Act.

Section 4. Backlog Declaration and Procedures. This section amends section 4 of the ESA to establish a set of procedures by which the Secretary may declare a “petition backlog” at different points in the listing petition process. This section further outlines what would occur with different categorized listing petitions once sorted by priority during a “petition backlog.” Finally, this section establishes a database by which individuals may search petitioned-for species listings.

Cost

No current CBO score is available.

Administration Position

Unknown.

Anticipated Amendments

Unknown.

Effect on Current Law (Ramseyer)

³¹ Allison Winter, Patrick Reis & E&E, ENDANGERED SPECIES: Obama admin confronts 'candidate species' backlog E&E News (2009), <https://www.eenews.net/stories/81931>. (Douglas Krofta serves as the U.S. Fish and Wildlife Service’s Chief in the Branch of Listing, Endangered Species Program).