

# Subcommittee on Water, Power and Oceans

Doug Lamborn, Chairman

Hearing Memorandum

October 10, 2017

To: All Subcommittee on Water, Power and Oceans Members

From: Majority Committee Staff, Subcommittee on Water, Power and Oceans (x58331)

Hearing: **Legislative hearing on H.R. 3916 (Rep. Ken Calvert, R-CA)**, To amend the Endangered Species Act of 1973 to vest in the Secretary of the Interior functions under that Act with respect to species of fish that spawn in fresh or estuarine waters and migrate to ocean waters, and species of fish that spawn in ocean waters and migrate to fresh waters.  
**October 12, 2017 at 10:00 AM; 1334 Longworth HOB.**

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**H.R. 3916 (Rep. Ken Calvert)**, "*Federally Integrated Species Health (FISH) Act*"

## **Bill Summary**

H.R. 3916 (Rep. Ken Calvert), the *Federally Integrated Species Health*, or *FISH, Act* is a bipartisan bill that reduces regulatory duplication in enforcement of the Endangered Species Act of 1973 (ESA) pertaining to anadromous and catadromous fish. The bill would vest all ESA authorities for managing these species solely within the Department of the Interior (Interior), eliminating the redundant role of the National Marine Fisheries Service (NMFS). This bill also makes the necessary conforming amendments to clarify that any references in statute or regulation assign these authorities to the Secretary of the Interior. This bill is similar to legislation considered in previous Congresses.

This hearing will also include consideration of one other bill.

## **Cosponsors:**

Rep. Doug LaMalfa (R-CA), Rep. Michael Simpson (R-ID), Rep. Jim Costa (D-CA), and David Valadao (R-CA)

## **Invited Witnesses (in alphabetical order):**

### Panel I

*The Honorable Ken Calvert*

Representative from the 42<sup>nd</sup> District of California

### Panel II

*Mr. Dan Keppen*

Executive Director

Family Farm Alliance

Klamath Falls, Oregon

*The Honorable Ryan Zinke*

Secretary

Department of the Interior

Washington, DC

## **Background**

### *The Endangered Species Act (ESA) of 1973*

In response to fears over dwindling populations of plant and animal species, Congress passed the Endangered Species Act in 1973 (P.L. 93-205). ESA sets out the broad goal of conserving and recovering species facing extinction<sup>1</sup>. The law authorizes federal agencies to identify imperiled species and list them as either threatened or endangered as appropriate.<sup>2</sup> The law further requires agencies to take necessary actions to conserve those species and their habitats. Congress made its most significant amendments to ESA in 1978, 1982, and 1988; though the overall framework has remained essentially unchanged since its original enactment in 1973.<sup>3</sup> In 44 years, there have been 2,335 total listings,<sup>4</sup> and in that time, 42 distinct species have been removed, either entirely or partially throughout their range, due to population recovery out of 72 total delisted species.<sup>5</sup>

Under the ESA, 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.<sup>6</sup> If federal actions<sup>7</sup> might affect a listed species, Section 7 of the ESA requires federal agencies that would carry out such actions to consult with FWS or NMFS or both to “ensure that their actions are ‘not likely to jeopardize the continued existence’ of any endangered or threatened species, nor to adversely modify critical habitat.”<sup>8</sup> NMFS currently manages an annual ESA budget of approximately \$182 million for the 159 species under its jurisdiction<sup>9</sup>, while FWS manages over 2,100 species with an annual ESA budget of over \$234 million.<sup>10</sup> In addition, some species, such as the Atlantic salmon and sea turtles and hatchery-bred salmon, have been co-listed and are managed by both FWS and NMFS, thus triggering the jurisdiction of both agencies.

When otherwise lawful actions occurring on private lands that lack a federal nexus result in the incidental take of a listed species, the appropriate Secretary may issue an incidental take permit.<sup>11</sup> These Section 10 Permits require applicants to submit a conservation plan outlining the impacts of the takings and steps the applicant will take to reduce such impacts along with any alternatives that could avoid such impacts.<sup>12</sup>

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<sup>1</sup> [The Endangered Species Act of 1973, 16 U.S.C. §1531\(b\).](#)

<sup>2</sup> [16 U.S.C. §1533.](#)

<sup>3</sup> [A History of the Endangered Species Act of 1973, United States Fish and Wildlife Service.](#)

<sup>4</sup> [Listed Species Summary, Environmental Conservation Online System, United States Fish and Wildlife Service.](#)

<sup>5</sup> [Delisted Species, Environmental Conservation Online System, United States Fish and Wildlife Service.](#)

<sup>6</sup> [Congressional Research Service Report “The Endangered Species Act: A Primer.” p. 8.](#)

<sup>7</sup> As defined in [40 CFR 1508.18.](#)

<sup>8</sup> [“The Endangered Species Act: A Primer”, p. 18.](#)

<sup>9</sup> <http://www.nmfs.noaa.gov/pr/species/esa/> and

[http://www.corporateservices.noaa.gov/nbo/fy17\\_bluebook/FY17\\_BB\\_Final\\_508.pdf](http://www.corporateservices.noaa.gov/nbo/fy17_bluebook/FY17_BB_Final_508.pdf)

<sup>10</sup> <https://www.fws.gov/home/feature/2016/pdfs/FY2017-FWS-Budget-in-Brief.pdf>

<sup>11</sup> [16 U.S.C. §1539.](#)

<sup>12</sup> [Id.](#)

## *Regulatory Duplication and Conflicts*

Each year, FWS and NMFS undertakes thousands of Section 7 consultations affecting a broad array of actions that have any federal nexus, usually resulting in the issuance of a Biological Opinion (BiOp) determining whether the federal action will or will not jeopardize the continued existence of the species in question nor adversely modify critical habitat.<sup>13</sup> If the BiOp concludes “no jeopardy” then the agency issues an incidental take statement allowing the action to continue.<sup>14</sup> If the BiOp concludes a “jeopardy” determination, then the agency either outlines Reasonable and Prudent Alternative courses of action (RPAs) that will allow the action to move forward without jeopardizing the species.<sup>15</sup> If no such alternatives exist, the action is not permitted to proceed.

In many cases, federal and private actions impact multiple species that fall under the jurisdiction of both the Department of the Interior and NOAA. In such instances, both FWS and NMFS must issue BiOps or engage in separate consultations detailing impacts on their respective species and detailing RPAs to mitigate jeopardy determinations if necessary. This redundant exercise can result in competing or conflicting recommendations from different agencies, and, in some cases, irreconcilable mandates, such as in the example below.

### *Examples of agency Duplication and Conflicts*

In the case of California, operations of the federal Central Valley Project (CVP) and the State Water Project (SWP) in the Sacramento-San Joaquin Bay-Delta (Bay-Delta) required BiOps from both FWS and NMFS relating to impacts on the Delta Smelt and certain species of listed salmon species respectively. The 2009 NMFS Biological Opinion for Winter-run Chinook salmon (2009 BiOp) requires the Bureau of Reclamation (Reclamation) to receive concurrence from NMFS prior to issuing water supply allocations for the water year.<sup>16</sup> On March 31, 2016, after reviewing Reclamation’s March forecast and water supply allocation, NMFS sent a concurrence letter stating: “NMFS concurs with Reclamation’s forecast based on March 15, 2016, hydrologic conditions, and initial water supply allocation, that RPA I.2.3.A should be implemented this year.”<sup>17</sup> Two weeks after sending its concurrence letter, NMFS indicated that its temperature projections were no longer valid. As a result, NMFS proposed to limit releases from Shasta Dam to 8,000 cubic feet per second (cfs) – down from a maximum of 10,500 cfs in the approved operations plan – through the summer and into the fall in order to preserve cold water for Winter-run Chinook salmon.<sup>18</sup>

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<sup>13</sup> [16 U.S.C. §1536\(b\).](#)

<sup>14</sup> [16 U.S.C. §1536\(b\)\(4\).](#)

<sup>15</sup> [Id.](#)

<sup>16</sup> [Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project, Southwest Region, National Marine Fisheries Service, June 4, 2009, p. 602.](#)

<sup>17</sup> [http://www.westcoast.fisheries.noaa.gov/publications/Central\\_Valley/Water%20Operations/nmfs\\_march\\_31\\_2016\\_response\\_to\\_the\\_bureau\\_of\\_reclamation\\_s\\_march\\_forecast.pdf](http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/nmfs_march_31_2016_response_to_the_bureau_of_reclamation_s_march_forecast.pdf), p. 4

<sup>18</sup> [http://valadao.house.gov/uploadedfiles/june\\_2016\\_letter\\_to\\_u.s.\\_interior\\_and\\_u.s.\\_commerce.pdf](http://valadao.house.gov/uploadedfiles/june_2016_letter_to_u.s._interior_and_u.s._commerce.pdf), p. 1

As NMFS sought to limit Delta outflow, FWS proposed to *increase* Bay-Delta outflow for the Delta smelt during the same period. According to a Reclamation spokesman, FWS requested up to 300,000 acre-feet of water for Delta outflow for the Delta smelt this summer.<sup>19</sup> Some contend that these actions are outside the requirements of the 2008 FWS Delta Smelt Biological Opinion (2008 BiOp).<sup>20</sup> At a July 2016 Subcommittee on Water, Power and Oceans hearing, Mr. Ara Azhderian, Water Policy Administrator for the

San Luis & Delta-Mendota Water Authority, testified: “The current BiOps have squeezed virtually all of the operational flexibility from the Projects, causing the damaging effects of the natural drought to amplify the chronic water supply shortages of the regulatory drought, with devastating effect throughout the CVP service area, but especially in the San Joaquin Valley”.<sup>21</sup>

ESA Section 10 permit applicants face similar uncertainty when their actions impact species that cross jurisdictional lines. For example, the ESA listing of several species including the Northern Spotted Owl and the marbled murrelet has stalled timber management activities on hundreds of thousands of acres of lands in the Pacific Northwest. Revenues from timber sales in the Pacific Northwest finance a variety of county services, including public schools.<sup>22</sup> Section 10 of ESA provides for non-federal stakeholders to develop habitat conservation plans (HCPs) for spotted owls and marbled murrelets in order to continue timber harvesting in ways that would mitigate impacts on these species.<sup>23</sup> These HCPs can be costly and take years to complete and receive approval from the federal government. However, in 2007 regulatory guidance issued by FWS and NMFS regional offices overseeing California, Nevada and the Pacific Northwest, FWS complicated the HCP development and Section 10 application processes.<sup>24</sup> According to the guidance, each Service will consider only multi-species HCPs that



Figure 1: Maps of NMFS (top) and FWS (bottom) regions. FWS Regions 1 and 8 issued the 2007 guidance jointly with NMFS Northwest and Southwest Regions.

<sup>19</sup> <http://www.sacbee.com/news/state/california/water-and-drought/article86742377.html>

<sup>20</sup> [http://valadao.house.gov/uploadedfiles/june\\_2016\\_letter\\_to\\_u.s.\\_interior\\_and\\_u.s.\\_commerce.pdf](http://valadao.house.gov/uploadedfiles/june_2016_letter_to_u.s._interior_and_u.s._commerce.pdf), p. 2

<sup>21</sup> [Written Testimony of Mr. Ara Azhderian before the Subcommittee on Water, Power and Oceans, Oversight Hearing "Changing Demands and Water Supply Uncertainty in California", July 12, 2016, p. 2.](#)

<sup>22</sup> ["Public Timber: Federal and State Programs Differ Significantly in Pacific Northwest", Report to the Chairman, Committee on Resources, House of Representatives, U.S. Government Accountability Office, May 1996, p. 1.](#)

<sup>23</sup> "OFIC Comments on Streamlining Regulatory Processes and Reducing Regulatory Burden", Letter from the Oregon Forest & Industries Council to the National Marine Fisheries Service, August 21, 2017, p. 2.

<sup>24</sup> "Guidance on Single-Species and Single-Agency Approaches to Endangered Species Act Section 10 Permits for Habitat Conservation Plans, Safe Harbor Agreements, and Candidate Conservation Agreement with Assurances", Joint Memorandum, National Marine Fisheries Service and United States Fish and Wildlife Service; July 11, 2007.

also encompass potential impacts on species under the jurisdiction of both Services if the lands in question may support any such species. Further, the guidance established that applicants pursue “parallel permit processes as a criterion for permit issuance,” effectively establishing a firewall between the Services’ individual ESA determinations.<sup>25</sup>

In Oregon, for example, FWS has refused to issue Section 10 permits to forestland owners for the marbled murrelet and Northern Spotted Owl unless the applicants also undertake the conservation measures required to obtain a Section 10 permit from NMFS for Oregon coast coho.<sup>26</sup> All three species have been listed for more than 20 years as threatened under the ESA, resulting in significant reduction of forest management actions on lands where the federal government issued stringent critical habitat designations covering millions of acres.

The different approach each Service takes to Section 4(d) rules (4(d) rules) creates further uncertainty for those attempting to navigate the interjurisdictional regulatory web. While the ESA applies a blanket prohibition on takings of endangered species,<sup>27</sup> this prohibition does not extend to threatened species. Section 4(d) authorizes each Service to promulgate regulations “the Secretary... deems necessary and advisable to provide for the conservation of [threatened] species”.<sup>28</sup> NMFS applies 4(d) rules to threatened species in its jurisdiction on a case-by-case basis, whereas FWS uses its 4(d) authority to extend a blanket taking prohibition to all threatened species in its jurisdiction and in some instances applies tailored rules to individual threatened species.<sup>29</sup> When the ESA requires both Services to participate in a Section 7 consultation or to issue a Section 10 permit, these differing regulatory styles add unnecessary hurdles to an already extensive review process.

Finally, the two agencies differ on how they categorize sub-populations of ESA listed species, often in the same areas where the agencies have designated critical habitat for individual species. In 1996, FWS and NMFS issued policy guidance<sup>30</sup> reflecting that the FWS recognizes that “distinct population segments” (DPS) of species of fish, wildlife and plants can be listed under ESA for protection, while NMFS redefined distinct populations of salmon species as “evolutionary significant units” (ESUs). This guidance and distinction has been criticized by some scientists and others as problematic for species management, improperly distinguishing certain salmon and freshwater species, and an inappropriate interpretation of the ESA.<sup>31</sup>

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<sup>25</sup> Id., p. 2.

<sup>26</sup> “OFIC Comments on Streamlining Regulatory Processes and Reducing Regulatory Burden”, Letter from the Oregon Forest & Industries Council to the National Marine Fisheries Service, August 21, 2017, p. 2.

<sup>27</sup> [16 U.S.C. §1538\(a\)](#).

<sup>28</sup> [16 U.S.C. §1533\(d\)](#).

<sup>29</sup> Curtiss, Sarah Stauffer, “A Necessary Tool for Conservation: The Case for Section 4(d) of the Endangered Species Act: Current & Emerging Issues Affecting Resource Development”, Paper 7C, Page No. 2 (Rocky Mt. Min. L. Fdn. 2015).

<sup>30</sup> <https://www.fws.gov/endangered/laws-policies/policy-distinct-vertebrate.html>

<sup>31</sup> <http://www.martenlaw.com/newsletter/20070221-esa-dps-interpretation>; <http://onlinelibrary.wiley.com/doi/10.1046/j.1523-1739.1997.96109.x/abstract>;

<http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1729&context=sulr>; [http://afs.tandfonline.com/doi/abs/10.1577/1548-8446\(2004\)29\[12:TCASH\]2.0.CO;2#.WdhGVzBryM8](http://afs.tandfonline.com/doi/abs/10.1577/1548-8446(2004)29[12:TCASH]2.0.CO;2#.WdhGVzBryM8)

*H.R. 3916 – The FISH Act*

In 1966 Congress passed the Marine Resources and Engineering Development Act (P.L. 89-454), which established a Commission on Marine Science, Engineering and Resources. The legislation directed the Commission to “make a comprehensive investigation and study of all aspects of marine science in order to recommend an overall plan for an adequate national oceanographic program that will meet the present and future national needs.”<sup>32</sup> The Commission published its final report “Our Nation and the Sea: A Plan for National Action” which laid the foundation for creation of NOAA.<sup>33</sup> President Nixon incorporated the Commission’s recommendation into his Advisory Council on Executive Organization which recommended that this new agency be housed in the Department of the Interior.<sup>34</sup> Nearly two-thirds of this new agency’s budget would be comprised of subsuming the Environmental Science Services Administration (ESSA) which operated within the Department of Commerce. Citing the prevalence of ESSA’s resources in the new budget for NOAA, then-Secretary of Commerce Maurice Stans – possibly aided by political strife between President Nixon and his Interior Secretary – successfully argued that NOAA should be temporarily housed in the Department of Commerce.<sup>35</sup> On October 3, 1970 President Nixon created NOAA as part of Reorganization Plan No. 4.<sup>36</sup>

In his 2011 State of the Union address, President Obama highlighted this duplicative authority as his “favorite example” of government inefficiency, saying “the Interior Department is in charge of salmon while they’re in freshwater, but the Commerce Department handles them when they’re in saltwater. And I hear it gets even more complicated once they’re smoked”.<sup>37</sup> Further, President Obama formally proposed the idea of merging NOAA into the Department of Interior in 2012 in his FY 2013 budget request and echoed the 2012 proposal in his FY 2016 budget request.<sup>38 39</sup>

The *FISH Act*, authored by Rep. Ken Calvert (R-CA), takes a step in righting a decades-old wrong. H.R. 3916 would eliminate bureaucratic redundancies by consolidating the ESA functions of NOAA and Interior relating to the conservation of anadromous and catadromous fish, making the Department of the Interior solely responsible for managing these species. This legislation will allow one wildlife management agency to comprehensively evaluate impacts on species interacting in a shared ecosystem and determine a holistic management approach.

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<sup>32</sup> [80 Stat 206.](#)

<sup>33</sup> [A History of NOAA, National Oceanic and Atmospheric Administration.](#)

<sup>34</sup> [Id.](#)

<sup>35</sup> [Id.](#)

<sup>36</sup> [84 Stat. 2090-3.](#)

<sup>37</sup> State of the Union Address, President Barack Obama, 2011.

<sup>38</sup> [Fiscal Year 2013 Budget of the United States, p. 41.](#)

<sup>39</sup> [Fiscal Year 2016 Budget of the United States, p. 81.](#)



## **Major Provisions/Section-by-Section Analysis of H.R. 3916**

*Section 2* transfers all ESA authority with respect to the conservation of anadromous and catadromous fish species from NOAA to the Department of the Interior. Section 2 amends Section 3 of the Endangered Species Act to reflect this change.

*Section 3* ensures any reference in Federal law, executive order, rule, regulation, or delegation of authority, or any document of or pertaining to a department or office from which a function is transferred by the *FISH Act* would refer to the Secretary and/or Department of the Interior upon passage. Section 3 also guarantees the *FISH Act* would impose no limitations on the Secretary of the Interior's authorities under the Endangered Species Act.

Section 3 also includes a number of savings clauses. The legislation would not interfere with existing rules, contracts, licenses, etc. or any court proceedings that had initiated prior to the date of enactment. If any official is party to a lawsuit in his/her official capacity relating to authorities transferred under this legislation, the lawsuit is allowed to proceed substituting the analogous officer within the Department of the Interior. Section 3 finally ensures compliance with all procedural and judicial review requirements with respect to exercise of transferred authorities by the Secretary of the Interior.

*Section 4* defines several key terms including "anadromous species" and "catadromous species".

### **Cost**

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

### **Administration Position**

Unknown.

### **Effect on Current Law (Ramseyer)**

#### **Showing Current Law as Amended by H.R. 3916**

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

Section 3 of the Endangered Species Act of 1973 (16 U.S.C. 1532)

### **§1532. Definitions**

For the purposes of this chapter-

\* \* \* \* \*

(15)(A) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the

enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(B) Notwithstanding subparagraph (A), with respect to anadromous species and catadromous species, the term “Secretary” means the Secretary of the Interior.

\* \* \* \* \*

(22) The term “anadromous species” means a species of fish that spawn in fresh or estuarine waters and that migrate to ocean waters.

(23) The term “catadromous species” means a species of fish that spawn in ocean waters and migrate to fresh waters.