

Committee on Natural Resources

Rob Bishop, Chairman
Hearing Memorandum

September 24, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff – Richie O’Connell (x58331)

Hearing: Legislative hearing on **H.R. 6354 (Rep. Paul A. Gosar, R-AZ)**, To amend the Endangered Species Act of 1973 to prohibit designation as critical habitat of certain areas in artificial water diversion or delivery facilities.
September 26, 2018, 2:00PM; 1324 Longworth House Office Building.

H.R. 6354, “Stop Takings On Reserves Antithetical to Germane Encapsulation Act of 2018” or “STORAGE Act”

Summary of the Bill

H.R. 6354 prohibits the designation of certain critical water infrastructure as critical habitat under the Endangered Species Act of 1973. By design, routine operations of these water systems cause daily and seasonal fluctuations in water levels and do not support the features necessary for critical habitat. This legislation provides certainty for water and power users throughout the nation, while appropriately evaluating habitat conducive to species recovery.

Cosponsors

Representatives Ralph Abraham (R-LA), Jim Banks (R-IN), Andy Biggs (R-AZ), Rob Bishop (R-UT), Kevin Cramer (R-ND), Jeff Duncan (R-SC), Ron Estes (R-KS), Louie Gohmert (R-TX), Jenniffer Gonzalez-Colon (R-PR), Duncan Hunter (R-CA), Doug LaMalfa (R-CA), Blaine Luetkemeyer (R-MO), Roger Marshall (R-KS), Tom McClintock (R-CA), Alex Mooney (R-WV), Dan Newhouse (R-WA), Kristi Noem (R-SD), Ralph Norman (R-SC), Scott Perry (R-PA) and Todd Rokita (R-IN).

Invited Witnesses (In alphabetical order)

Mr. Robert Dreher

Senior Vice President, Conservation Programs & General Counsel
Defenders of Wildlife
Washington, D.C.

Mr. Jamie Johansson

President
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 appropriate¹. 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 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

¹ 16 U.S.C. 1533.

² *Id.*

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

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).

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 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.

Critical Habitat under the ESA

Section 4(a)(3) of the ESA requires the relevant Secretary to designate critical habitat for any species added to the endangered or threatened species list concurrent with that species'

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.*

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>.

formal listing.¹⁶ The ESA defines critical habitat as “the specific areas within the geographical area occupied by the species, at the time it is listed...on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection”.¹⁷ This definition also includes areas unoccupied by the species, but are necessary for species conservation.¹⁸

The original concept of critical habitat was far broader than its current form because the term lacked a formal definition in 1973.¹⁹ After the decision in *Tennessee Valley Authority v. Hill* (1978), where the Supreme Court enjoined construction of the Tellico Dam due to its perceived impacts on the snail darter, Congress undertook major revisions to the ESA.²⁰ Notable changes made by the Endangered Species Act Amendments of 1978 (1978 amendments, Public Law 95-632) were allowing for economic considerations in critical habitat determinations, amending the definition of critical habitat to its current form, and granting the relevant Secretary authority to exclude an area from critical habitat “if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat”.²¹ With these amendments, Congress required that the Secretaries, at their complete discretion, weigh economic impacts against any unique and irreplaceable value that the associated discrete portion of critical habitat may provide.²² Congress understood and affirmed that this increased flexibility would, in some instances, result in a different critical habitat designation than would be determined on solely a biological basis, but felt the remaining prohibitions of the ESA provided adequate protections to listed species.²³

The current foundation of a critical habitat designation is when the appropriate Secretary identifies “specific areas that contain the physical or biological features essential to [a species]’ conservation”.²⁴ Further, joint regulations developed by the Secretaries define what constitutes an imprudent critical habitat designation. This includes situations where “the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species” or when “[s]uch designation of

¹⁶ 16 U.S.C. 1533(a)(3)(A)(ii).

¹⁷ 16 U.S.C. 1532(5).

¹⁸ *Id.*

¹⁹ “Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act...by taking such action necessary to insure that actions authorized, funded, or carried out by them do not...result in the destruction or modification of habitat of such species which is determined by the Secretary... to be critical” (Pub. L. No. 93-205 §7). This was the only reference to critical habitat in the ESA as originally drafted.

²⁰ S. Rep. 95-874 (1978) at 2, retrieved from

[https://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/\\$2fapp-bin\\$2fgis-serialset\\$2f4\\$2f7\\$2f3\\$2f2\\$2f13197-5_srp874_from_1_to_12.pdf/entitlementkeys=1234%7Capp-gis%7Cserialset%7C13197-5_srp.874](https://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/$2fapp-bin$2fgis-serialset$2f4$2f7$2f3$2f2$2f13197-5_srp874_from_1_to_12.pdf/entitlementkeys=1234%7Capp-gis%7Cserialset%7C13197-5_srp.874); H.R. Rep. 95-1625 (1978), at 10, retrieved from

[https://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/\\$2fapp-bin\\$2fgis-serialset\\$2f0\\$2fb\\$2f9\\$2f8\\$2f13201-13_hrp1625_0001_from_1_to_50.pdf/entitlementkeys=1234%7Capp-gis%7Cserialset%7C13201-13_hrp.1625](https://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/$2fapp-bin$2fgis-serialset$2f0$2fb$2f9$2f8$2f13201-13_hrp1625_0001_from_1_to_50.pdf/entitlementkeys=1234%7Capp-gis%7Cserialset%7C13201-13_hrp.1625). Both House and Senate reports on the chambers’ respective bills heavily feature the case of Tellico Dam and the Snail Darter.

²¹ 16 U.S.C. 1533(b)(2).

²² *Id.*

²³ H.R. Rep. 95-1625 at 17.

²⁴ Critical Habitat under the Endangered Species Act, OFFICIAL WEB PAGE OF THE U S FISH AND WILDLIFE SERVICE, <https://www.fws.gov/southeast/endangered-species-act/critical-habitat/>.

critical habitat would not be beneficial to the species”.²⁵ Using this authority, FWS routinely excludes certain infrastructure from critical habitat designations. FWS regulations specifically cite paved roads and buildings in regulations with respect to Secretarial exclusions from critical habitat.²⁶ Further, in FWS’s overview on critical habitat, FWS states that their rules typically exclude “developed areas such as buildings, roads, airports, parking lots, piers, and similar facilities”.²⁷

H.R. 6354 is a logical extension of current regulations and prior amendments to the ESA. This legislation would prohibit the relevant Secretary from designating critical habitat that includes certain water infrastructure where “habitat is periodically created and destroyed as a result of changes in water levels caused by the operation of such facility.”²⁸ Many reservoirs, water conveyance systems and other water infrastructure components are unsuitable habitat for species. These systems are designed to regulate supplies of water and hydropower to meet human needs. Reservoir levels fluctuate widely over the course of a day to accommodate peak demand for water and power supplies, over the course of year with respect to seasonal precipitation and runoff from melting snowpack, and over the course of a multi-year complex due to climatic conditions such as drought. Like roads and buildings, much of this critical infrastructure generally fails to contain “those physical or biological features...essential to the conservation of species”,²⁹ and, as such, is unlikely to benefit the species. While these systems are unsuitable habitat, a critical habitat designation could significantly curtail water and power deliveries to Americans nationwide. H.R. 6354 would codify this common-sense treatment of water infrastructure as critical infrastructure and extend to it the same considerations already afforded to roads and other economically important infrastructure.

Cost

The Congressional Budget Office has not completed a cost estimate of this bill.

Administration Position

Unknown.

Major Provisions of H.R. 6354

Section 2. Prohibition of Designation of Certain Habitat in an Artificial Water Delivery or Storage Facility as Critical Habitat. Prohibits the designation as critical habitat of certain water infrastructure whose operations do not support suitable habitat for listed species.

²⁵ 50 CFR 424.12(a)(1).

²⁶ 50 CFR §17.94(b)(1)

²⁷ U.S. Fish and Wildlife Service, OFFICIAL WEBSITE OF THE U.S. FISH AND WILDLIFE SERVICE, https://www.fws.gov/endangered/esa-library/pdf/critical_habitat.pdf.

²⁸ STORAGE Act, H.R. 6354 §2, 115th Cong. (2018), available at <https://www.congress.gov/115/bills/hr6354/BILLS-115hr6354ih.pdf>.

²⁹ 16 U.S.C. 1532(5).

Effect on Current Law (Ramseyer)

Showing Current Law as Amended by H.R. 6354

[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

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970-

(A) in any case in which the Secretary of Commerce determines that such species should-

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species, he shall so inform the Secretary of the Interior; who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should-

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species, he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable-

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under [section 670a of this title](#), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under [section 1536\(a\)\(2\) of this title](#) with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with [section 1538 of this title](#), including the prohibition preventing extinction and taking of endangered species and threatened species.

(C) The Secretary shall not designate as critical habitat any area in a water storage reservoir, water diversion structure, canal, or other water storage, diversion, or delivery facility, where habitat is periodically created and destroyed as a result of changes in water levels caused by the operation of such facility.