

Foley and Lardner State and Federal Affairs Report
October 4, 2018

Shasta Dam Raise

Dennis will provide an oral report

ESA Administrative Proposals

Attached

ESA Legislative Proposals

Attached

ESA Legislative Proposals House of Representatives Hearing Attached

AB747 SWRCB- Administrative Hearings Office

* AB 747 removes the built-in conflicts of interest in the current California State Water Resources Control Board (SWRCB) structure, leveling the playing field for water users who have felt they had no choice but to settle enforcement actions brought by the SWRCB. The SWRCB currently acts as both prosecutor and judge in enforcement actions the Board itself initiates. AB 747 creates an Administrative Hearings Office within the SWRCB. Expert attorneys will act as an objective third party to oversee and adjudicate complex, critically important water rights matters.

* Signed into law last month

* Discussions with state agencies on implementation post election

State Water Resources Control Board –Water Quality Control Plan - Phases 1 and 2- Engaged in discussions on several matters with high level state officials and will raise with at least one candidate for Governor

State Water Resources Control Board Member opening

Engaged in discussions on possible nominations to fill the opening after the election

ESA Regulatory Reforms

The Trump Administration has proposed a series of changes to regulations that implement the Endangered Species Act. These recent actions are the latest in a series of proposed reforms to the Endangered Species Act, which is seeing more policy attention than it has over five years.

Proposed Regulatory Changes

Listing/delisting species as endangered or threatened:

- Require same standard for listing as for delisting a species
- Remove “without reference to possible economic or other impacts of such determination” from the requirements regarding determination of inclusion on a list
- Clarify what “foreseeable future” means in the context of a threatened species being “any species which is likely to become an endangered species within the foreseeable future.”

Designating critical habitat:

- Clarify when designation of critical habitat may not be prudent
- Reinstates the requirement to first evaluate areas currently occupied by the species before considering unoccupied areas.
- Clarify when unoccupied areas can be considered essential to the conservation of the species

The U.S. Fish and Wildlife Service is also proposing to rescind its blanket rule that automatically conveys the same protections for threatened species as for endangered species, bringing it in line with the U.S. National Marine Fisheries Service.

Reception/Prospects

- House Committee on Natural Resources thinks these are moderate, common sense reforms that have a good chance of success.
- Democratic opposition has been quieter than for other ESA reforms
- “These proposals would slam a wrecking ball into the most crucial protections for our most endangered wildlife,” said Brett Hartl, government affairs director at the Center for Biological Diversity
- “...a closer look will reveal both advantages and concerns from a conservation perspective,” Jake Li, director for biodiversity at the Environmental Policy Innovation Center (Sand County Foundation), said prior to the release.

ESA Legislative Reforms

GOP members of the House introduced nine bills to modernize the Endangered Species Act. The LOCAL and WHOLE Acts are bipartisan – they were both cosponsored by Kurt Schrader (D-OR).

- **H.R. 6356, the LIST Act, introduced by Rep. Andy Biggs (AZ-05).** The LIST Act makes a number of improvements to help bring the ESA up-to-date. Notably, this legislation authorizes the Secretary of the Interior to de-list species when he receives objective, measurable scientific study demonstrating a species is recovered.
- **H.R. 6345, the EMPOWERS Act, introduced by Rep. Steve Pearce (NM-02).** While a pipeline under the ESA exists for States to provide input, the fact that the Act itself imposes no special requirement upon decision-makers to consult States has become, with the passage of time, a glaring omission. Such consultation requirements will ensure that no privileged or State-specific information slips through the cracks when listing decisions are made.
- **H.R. 6344, the bipartisan LOCAL Act, introduced by Rep. Scott Tipton (CO-03).** Species conservation experts and policy powerhouses alike have recommended for decades that the Endangered Species Act be amended in order to codify incentives and set clear statutory channels for recognizing such voluntary efforts. This legislation would codify several longstanding practices and regulatory language which facilitate voluntary conservation, including Species Recovery Agreements (SRAs) and Habitat Reserve Agreements (HRAs).
- **H.R. 6355, the PETITION Act, introduced by Rep. Bruce Westerman (AR-04).** The United States Fish and Wildlife Service (USFWS) is instructed by law to issue decisions on petitions within specific timeframes established in the Act. When they miss those timelines, they are vulnerable to lawsuits by petitioners. A final, crucial fact to note: *Anyone* can submit *any number* of petitions containing *any amount of information* – or misinformation. This bill reforms that petition process, allowing the Secretary to declare a ‘petition backlog’ when too many frivolous petitions stack up and USFWS becomes vulnerable to lawsuit.
- **H.R. 6364, the LAMP Act, introduced by Rep. Don Young (AK-At Large).** Local governments, tribes and states have been successful players in species conservation and recovery since passage of the Endangered Species Act (ESA) in 1973. Despite their strong track record, the Act itself contains a relatively weak framework for facilitating interaction amongst these players and federal species conservation-responsible agencies. The LAMP Act permits the Secretary of the Interior to enter into cooperative management agreements with states local governments, tribes and other non-federal persons in order to better manage species and improve habitat conservation.
- **H.R. 6360, the PREDICTS Act, introduced by Rep. Ralph Norman (SC-05).** Habitat Conservation Plans (HCPs) are comprehensive planning documents created collaboratively between Fish and Wildlife or National Marine Fisheries and a person, government or corporation pursuing permitting and development for a project which is likely to result in listed species takings. This simple bill aims to codify the requirements for HCPs, and similar Candidate Conservation Agreements with Assurances and Safe Harbor Agreements found in agency regulations in order to provide certainty and reward the good

behavior of public and private entities that faithfully uphold their agreements in order to help recover listed species.

- **H.R. 6346, the bipartisan WHOLE Act, introduced by Rep. Mike Johnson (LA-04).** This simple bill ensures that the totality of conservation measures underway will be considered before taking federal actions that impact species.
- **H.R. 6354, the STORAGE Act, introduced by Rep. Paul Gosar (AZ-04).** This simple bill will ensure sure that confused and mistaken critical habitat listings cannot take place – for the benefit of listed species, water and power infrastructure operators as well as water and power customers.
- **H.R. 3608, the Endangered Species Transparency and Reasonableness Act, introduced by Rep. McClintock (CA-04).** H.R. 3608 requires data used by federal agencies for ESA listing decisions to be made publicly available and accessible through the Internet, allowing the American people to actually see what data is being used to make key listing decisions.

Senator Barrasso (R-WY) convened a hearing in July on his draft reform legislation.

- Elevate the role of state conservation agencies in species management
- Increase transparency associated with carrying out conservation under the Act
- Prioritize available resources for species recovery
- Provide regulatory certainty for landowners and other stakeholders to facilitate participation in conservation and recovery activities
- Require that listing of any species must also include recovery goals, habitat objectives, and other criteria established by the Secretary of Interior, in consultation with impacted states, for the delisting or downlisting of the species
- Require that the satisfaction of such criteria must be based on the best scientific and commercial data available
- Enable states the opportunity to lead recovery efforts for listed species, including through a species' recovery team

Full Committee Legislative Hearing
Wednesday, September 26, 2018 2:00 PM
1324 Longworth House Office Building

- **H.R. 6344**, the *LOCAL Act of 2018 (Rep. Scott Tipton of Colorado)*, To amend the Endangered Species Act of 1973 to encourage voluntary conservation efforts.
- [Hearing Memo](#)
- **H.R. 6360**, the *PREDICTS Act of 2018 (Rep. Ralph Norman of South Carolina)*, To amend the Endangered Species Act of 1973 to provide for greater certainty and improved planning for incidental take permit holders.
- [Hearing Memo](#)
- **H.R. 6346**, the *WHOLE Act of 2018 (Rep. Mike Johnson of Louisiana)*, To amend the Endangered Species Act of 1973 to provide for consideration of the totality of conservation measures in determining the impact of proposed Federal agency action.
- [Hearing Memo](#)
- **H.R. 6354**, the *STORAGE Act of 2018 (Rep. Paul Gosar of Arizona)*, To amend the Endangered Species Act of 1973 to prohibit designation as critical habitat of certain areas in artificial water diversion or delivery facilities.
- [Hearing Memo](#)
- **H.R. 6345**, the *EMPOWERS Act of 2018 (Rep. Stevan Pearce of New Mexico)*, To provide for greater county and State consultation with regard to petitions under the Endangered Species Act of 1973, and for other purposes.
- [Hearing Memo](#)
- **H.R. 3608**, *The Endangered Species Transparency and Reasonableness Act (Rep. Tom McClintock of California)*, To amend the Endangered Species Act of 1973 to require publication on the Internet of the basis for determinations that species are endangered species or threatened species, and for other purposes.
- [Hearing Memo](#)
- **H.R. 6364**, the *LAMP Act of 2018 (Rep. Don Young of Alaska)*, To amend the Endangered Species Act of 1973 to increase State and local involvement in management plans.
- [Hearing Memo](#)
- **H.R. 6356**, the *LIST Act of 2018 (Rep. Andy Biggs of Arizona)*, To amend the Endangered Species Act of 1973 to provide for improved precision in the listing, delisting, and downlisting of endangered species and potentially endangered species.
- [Hearing Memo](#)
- **H.R. 6355**, the *PETITION Act of 2018 (Rep. Bruce Westerman of Arkansas)*, To amend the Endangered Species Act of 1973 to define petition backlogs and provide expedited means for discharging petitions during such a backlog.
- [Hearing Memo](#)

WITNESSES:

Mr. Robert Dreher
Senior Vice President
Conservation Programs & General Counsel
Defenders of Wildlife
([Resume](#))
([Disclosure](#))

Mr. Jamie Johansson
President
California Farm Bureau
Sacramento, CA
([Resume](#))
([Disclosure](#))

Mr. Gregg Renkes
Director
Office of Policy Analysis
U.S. Department of the Interior
Washington, DC
([Disclosure](#))

Mr. David Sauter
County Commissioner
Klickitat County
Lyle, WA
([Resume](#))
([Disclosure](#))

Mr. Jonathan Wood
Attorney
Pacific Legal Foundation
Washington, DC
([Resume](#))
([Disclosure](#))

SUMMARY:

Republicans focused on the need for the Endangered Species Act (ESA) to be updated. They described the bill package as a tool to modernize the ESA, increase its predictability, and improve the role of state and local government. There was not much Democratic participation in the hearing, but it was mostly staunchly opposed to the bill package. The one witness who was opposed to the bill package described it as a land development package that will only hurt the ESA and in some severe ways. The only moderate voice was Congressman Costa who acknowledged the need for modernization of the ESA, and agreed with the ideas behind many of the reforms. However, he stopped short of endorsing bills saying that the issues need to be tackled in a bipartisan fashion. He specifically mentioned that the STORAGE, LOCAL, and PREDICTS act deserve “consideration and refinement.”

I have also paraphrased some notable interactions below:

Huffman – Against. The ESA has been successful and used to be bipartisan. STORAGE Act would prohibit federal agencies from designating habitat in manmade water infrastructure areas. This will endanger CA salmon and steelhead. LIST Act said a species must delist if the agency receives substantial scientific OR commercial information showing that the species have recovered.

Grijalva – Against. These bills are not meant to fix the act, they aren’t thoughtful, they are bad faith proposals and are handouts to oil and gas. No evidence that the ESA kills jobs or stunts growth. We have a duty to preserve species. These bills are an embarrassment and a waste of time.

Bishop – For. This is about modernizing the act. Public agrees it should be updated, it should be about recovering species, and it should be more state-controlled.

Tipton – LOCAL Act is bipartisan. Let local leaders lead conservation efforts

Renkes – For. Admin supports goals of ESA, but we must partner more with states and private land-owners who often bear burden of ESA. Zinke released memo instructing department to better align with states. We agree with the goals of improving predictability of the ESA.

Johansen – For. ESA to work better it must work better for people.

Sauter – For. We must modernize ESA.

Dreher – Against. ESA is world’s most effective conservation law. It has been improved by continuous administrative reform including incorporating stakeholder needs. Law doesn’t need more changing, it needs full funding. These bills don’t help the ESA, they weaken it. The bills gut its science-based listing process, create arbitrary barriers to listing species, and allow states

and counties to essentially veto decisions to list species. It puts too much of a burden on states which often lack resources to protect species. Dramatic undermining of ESA.

Wood – For. Need more involvement by state and local. Only 3% of species get delisted. Though it's true only 1% of species have gone extinct.

Dreher to Grijalva - There is a provision that is a gold mine for speculators - it requires the secretary to pay any person that submitted a proposal for land use development if it raised the risk of taking.

Renkes to Grijalva – Interior needs to consult more on offsite mitigation issues before supporting that section of the WHOLE Act.

Costa – It's time to take a serious look at how we can improve the ESA. It is currently a blunt tool that has had some negative effects. We need to work together in a bipartisan way. STORAGE, LOCAL, and PREDICTS act deserve consideration and refinement. There are lots of factors going into the problems with endangered species, such as climate change, and those aren't all accounted for in the ESA. We're trying to come together with compromises to fix the water issue in California. Do you think we'll be able to work through them?

Johansson – The ESA is a blunt instrument that makes it hard to fix the California water issues. It isn't just flows that provide the smelt with benefit.

Costa – That's why reconsultation of the opinions is very important right now.

Dreher to Gallego – These bills want to create special breaks for people who want to develop their land in ways that will adversely affect endangered species – that's about half of them. They are a pro land development set of bills. At least twice, they preclude judicial review for organizations protecting species, but the bills allow judicial review for the people who are harming endangered species. One of the bills allows the secretary to delegate management of a species to a private entity.

Dreher – There are real concerns about the states' ability to take over for FWS, but of course they should work together.