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2d Session
HOUSE OF REPRESENTATIVES
REPORT
113–539

STATE, TRIBAL, AND LOCAL SPECIES TRANSPARENCY AND RECOVERY ACT

JULY 17, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HASTINGS of Washington, from the Committee on Natural Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4317]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 4317) to amend the Endangered Species Act of 1973 to require disclosure to States of the basis of determinations under such Act, to ensure use of information provided by State, tribal, and county governments in decisionmaking under such Act, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 4317 is to amend the Endangered Species Act of 1973 to require disclosure to States of the basis of determinations under such Act, and to ensure use of information provided by State, tribal, and county governments in decisionmaking under such Act.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 4317 is intended to ensure the federal government adheres to statutory responsibilities to: (1) cooperate with States under the Endangered Species Act (ESA), specifically regarding data used in listing proposals and regulations; and (2) ensure the best available scientific and commercial data used in ESA listing decisions in-

cludes data made available to the federal government from affected States, local county governments and tribal governments.

The bill addresses two basic, but important goals. First, it would require the federal government to adhere to the clear language of section 6(a) of the ESA, which provides that: "in carrying out the program authorized by the Act, the Secretary shall cooperate to the maximum extent practicable with the States" (emphasis added).

In testimony before the Committee on Natural Resources, States have expressed concerns that the federal agencies' handling of species listing petitions has not been conducive to State participation, that the federal agencies often duplicate analyses and conservation plans already generated by States, and that data provided by the States is sometimes ignored by the federal agencies in ESA activities.

ESA listing and delisting decisions typically result in transferring the jurisdiction for management of a species between State and federal authority. States have argued that full State involvement is needed, since the States either were the species managers prior to a listing decision or will become the managers after a delisting decision. States also have extensive experience and expertise in science-based wildlife management principles and the application of public policy in managing wildlife as a public asset. States should be afforded every opportunity to provide input to laws, regulations and policies in implementing the ESA before they are final.

In current potential listings evolving out of the Department of the Interior's 2011 multi-district litigation settlements with the Center for Biological Diversity and WildEarth Guardians, many States continue to face regulatory uncertainty, despite significant State investment and collaborative partnerships with private landowners and other entities to conserve species and prevent the need for a federal ESA listing.

For example, the Bureau of Land Management (BLM), the U.S. Forest Service and the Fish and Wildlife Service (FWS) are in the midst of revising federal resource management plans affecting millions of acres of lands in western states in anticipation of a 2015 listing determination deadline for the Greater Sage Grouse imposed by the 2011 settlement. The Committee has received extensive testimony during multiple hearings about federal agencies' reliance on the National Technical Team (NTT) Report. Issued in 2011, the NTT Report has been criticized for imposing "one-size-fits-all" regulatory prescriptions, including invalid assumptions, mischaracterizing and misrepresenting sources, omitting existing programs benefitting sage grouse, and injecting personal opinion over science. The NTT Report has been used to justify four-mile buffers around areas identified as necessary for breeding sage grouse, known as "leks." This standard could shut down access to large swaths of economic, energy and recreational activities in the western United States. States dispute the data and information in the report. Further, in 2012, the FWS issued a "Conservation Objectives Team" Report which has also drawn criticism for omitting independent data/analyses on the causes of decline for the sage grouse, and for failing to use the most current state and local maps.

In December 2010, the FWS proposed to list the Dunes Sagebrush Lizard as endangered under the ESA. Texas officials raised

concerns that the FWS' listing proposal depended on scant, outdated data from the 1960s to determine the lizard's known distribution, and assumed that the lizard was "locally extinct" in certain areas where the State of Texas had verified it was present. After further research and data surveys conducted in cooperation with States, local governments and other affected stakeholders, the FWS reversed its earlier determination to list the Dunes Sagebrush Lizard as endangered in June 2012. As a result, the lizard continues to co-exist with State economic activities in an area that produces 14% of the nation's oil, and 47,000 jobs.

Earlier this year, despite over $50 million spent for conservation, research and other activities, and more than 10 million acres enrolled, and the FWS' "endorsement" of a five-state plan in Texas, Oklahoma, Kansas, New Mexico and Colorado, the FWS finalized a federal listing of the Lesser Prairie Chicken under the ESA. These States, which clearly have proven their intent to make Lesser Prairie Chicken conservation a priority, should have a greater opportunity to demonstrate the success of their activities rather than be forced into a federal listing by an arbitrary, court-settlement deadline negotiated without their approval by the FWS.

Second, H.R. 4317 would ensure that the best scientific and commercial data available to the Secretaries of the Interior or Commerce and used by them in ESA listing decisions includes data from those closest to the ground and most impacted by the listings: the States, local governments and tribes. The Natural Resources Committee, through State, local and tribal testimony, has received several examples of the federal agencies not including data or information in decisions where they are required to utilize the "best scientific and commercial data available."

For example, in 2012, the FWS issued a revised recovery plan for the Utah Prairie Dog which required that prairie dogs located only on federal lands would be counted for purposes of recovery. Two Utah counties and private landowners have been unable to control an influx of prairie dogs that have destroyed private lands, and have requested the FWS to count prairie dogs on State, local, and private lands for recovery, which the FWS has refused or ignored. This FWS interpretation has created significant costs for rural electric cooperatives to maneuver transmission poles around federal lands that have been designated for Utah Prairie Dogs.

In 2008, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) concluded in ESA biological opinions that 28 listed salmon populations would be "jeopardized" by continued use of crop protection products long registered and labeled by the EPA. NMFS' requirements included nearly a quarter-mile buffer around water bodies affecting as much as 60 percent of agricultural lands in Washington state alone, which, according to an estimate by the U.S. Department of Agriculture, could result in lost revenues of over $580 million. State agriculture agencies expressed concerns that NMFS failed to utilize current state data and information and did not allow transparency and review to ensure use of best available scientific and commercial data.

In 2012, Garfield County, Colorado's Board of Commissioners questioned the accuracy of a map developed by the FWS for Greater Sage Grouse habitat in Colorado after FWS refused the County's

request to verify data used by the FWS in its NTT report. In more than one example, a court order has been required to enforce Freedom of Information Act requests to obtain the data from federal officials.

Tribal governments also play a significant role in species conservation and recovery activities, and some tribes have testified about concerns that their own data and science are not being factored into ESA listing decisions. In the Columbia and Snake Rivers, where NMFS listed 13 sub-populations of salmon as threatened or endangered under ESA, tribal hatchery managers have successfully utilized hatchery supplementation to enhance salmon and steelhead recovery for several years. The Snake River fall chinook run has rebounded to record levels due in large part to the Nez Perce and Umatilla Tribe hatchery programs (expanding from 500 adult fish in 1975 to more than 41,000 in 2010). NMFS has refused tribal requests that the agency factor its scientific data highlighting the positive benefits of hatchery fish in its listing determinations for recovering salmon in the Northwest.

H.R. 4317 does not favor one science over another or require that multiple county or State's submission of conflicting data be deemed "best available" to the exclusion of another. The Secretaries of the Interior or Commerce would continue to have final discretion on what constitutes "best available scientific and commercial data." However, H.R. 4317 would ensure that they incorporate and provide proper respect for data provided to them by States, tribes and local governments.

COMMITTEE ACTION

H.R. 4317 was introduced on March 27, 2014, by Congressman Randy Neugebauer (R–TX). The bill was referred to the Committee on Natural Resources. On April 8, 2014, the Committee held a hearing on the bill, and on April 30, 2014, the Committee met to consider the bill. Congressman Jared Huffman (D–CA) offered an amendment designated .001 to the bill; the amendment was not adopted by voice vote. No further amendments were offered, and the bill was then adopted and ordered favorably reported to the House of Representatives by a rollcall vote of 26 to 16, as follows:

Committee on Natural Resources
U.S. House of Representatives
113th Congress

Date: April 30, 2014 Recorded Vote #: 4

Meeting on / Amendment on: **H.R. 4317 - TO REPORT**, Adopted and favorably reported to the House of Representatives by a roll call vote of 26 yeas and 16 nays.

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Hastings, WA, Chairman	X			**Mr. Duncan of SC**	X		
Mr. DeFazio, OR, Ranking		X		*Mr. Cardenas, CA*		X	
Mr. Young, AK	X			**Mr. Tipton, CO**	X		
Mr. Faleomavaega, AS				*Mr. Huffman, CA*		X	
Mr. Gohmert, TX	X			**Mr. Gosar, AZ**	X		
Mr. Pallone, NJ		X		*Mr. Ruiz, CA*		X	
Mr. Bishop, UT	X			**Mr. Labrador, ID**	X		
Mrs. Napolitano, CA		X		*Ms. Shea-Porter, NH*		X	
Mr. Lamborn, CO	X			**Mr. Southerland, FL**	X		
Mr. Holt, NJ				*Mr. Lowenthal, CA*		X	
Mr. Wittman, VA	X			**Mr. Flores, TX**	X		
Mr. Grijalva, AZ		X		*Mr. Garcia, FL*			
Mr. Broun, GA	X			**Mr. Runyan, NJ**	X		
Ms. Bordallo, GU		X		*Mr. Cartwright, PA*		X	
Mr. Fleming, LA	X			**Mr. Mullin, OK**	X		
Mr. Costa, CA		X		*Ms. Clark, MA*		X	
Mr. McClintock, CA	X			**Mr. Daines, MT**	X		
Mr. Sablan, CNMI		X		**Mr. Cramer, ND**	X		
Mr. Thompson, PA	X			**Mr. LaMalfa, CA**	X		
Ms. Tsongas, MA		X		**Mr. Smith, MO**	X		
Mrs. Lummis, WY	X			**Mr. McAllister, LA**	X		
Mr. Pierluisi, PR				**Mr. Byrne, AL**	X		
Mr. Benishek, MI	X			*Vacancy*			
Ms. Hanabusa, HI		X					
				TOTALS	26	16	

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

H.R. 4317—State, Tribal, and Local Species Transparency and Recovery Act

H.R. 4317 would require the Secretaries of the Interior and Commerce to make data used as the basis for each listing determination under the Endangered Species Act (ESA) available to states. Determinations under the ESA are made on the basis of the best scientific and commercial data available. H.R. 4317 would clarify that such data includes data provided by state, local, and tribal governments. Based on information provided by the affected agencies, CBO estimates that implementing the legislation would have no significant effect on the federal budget. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 4317 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Jeff LaFave. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

2. Section 308(a) of Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. Based on information provided by the affected agencies, CBO estimates that implementing the legislation would have no significant effect on the federal budget.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to amend the Endangered Species Act of 1973 to require disclosure to States of the basis of determinations under such Act, and to ensure use of information provided by State, tribal, and county governments in decisionmaking under such Act.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

COMPLIANCE WITH H. RES. 5

Directed Rule Making. The Chairman does not believe that this bill directs any executive branch official to conduct any specific rule-making proceedings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95–220, as amended by Public Law 98–169) as relating to other programs.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT OF 1973

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DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) * * *

(2) The term "best scientific and commercial data available" includes all such data submitted by a State, tribal, or county government.

[(2)**]** *(3)* The term "commercial activity" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibitions of commodities by museums or similar cultural or historical organizations.

[(3)**]** *(4)* The terms "conserve," "conserving," and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are

not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

[(4)] *(5)* The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

[(5)] *(6)*(A) * * *

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[(6)] *(7)* The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

[(7)] *(8)* The term "Federal agency" means any department, agency, or instrumentality of the United States.

[(8)] *(9)* The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

[(9)] *(10)* The term "foreign commerce" includes, among other things, any transaction—

(A) * * *

* * * * * * *

[(10)] *(11)* The term "import" means to land on, bring into, or introduce into or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

[(12)] *(12)* The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 7, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) to such agency action.

[(13)] *(13)* The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

[(14)] *(14)* The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

[(15)] *(15)* 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 Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

[(16)] *(16)* The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

[(17)] *(17)* The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

[(18)] *(18)* The term "State agency" means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

[(19)] *(19)* The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

[(20)] *(20)* The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

[(21)] *(21)* The term "United States," when used in a geographical context, includes all States.

* * * * * * *

COOPERATION WITH THE STATES

SEC. 6. (a) GENERAL.—*(1)* In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States. [Such cooperation shall include]

(2) Such cooperation shall include—

(A) before making a determination under section 4(a), providing to States affected by such determination all data that is the basis of the determination; and

(B) consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

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INTERAGENCY COOPERATION

SEC. 7. (a) * * *

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(n) JUDICIAL REVIEW.—Any person, as defined by [section 3(13)] *section 3(14)* of this Act, may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of

title 28, United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

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DISSENTING VIEWS

H.R. 4317 decrees that all data submitted by states, tribes or local governments be considered the "best scientific data available." The bill would also require that all data that is the basis of a listing determination under the Endangered Species Act be provided to any state affected by the listing prior to the final determination being made.

These provisions are troubling on a number of levels. Forcing Federal agencies to accept as the best available science anything that states, localities or tribes submit is both preposterous and impractical. The lack of quality control would invite the submission of incomplete, shoddy, or falsified information in support of political positions, not scientific realities.

Further, H.R. 4317 opens up a whole new avenue for litigation under the ESA, particularly in cases where states, localities, or tribes submit conflicting data. There is no scientific basis whatsoever for Congress to establish any particular source of data as being the "best" when in fact it may not be. Agency decision-makers must constantly evaluate data from all sources to ensure they are making decisions based on the best information available, and we should encourage them to continue doing so.

At Committee markup, the Majority argued that the bill would only require Federal agencies to "consider" this data as the best available, not mandate it. Unfortunately, an honest reading of H.R. 4317 in the context of the ESA does not support such an argument. If we are to believe the Majority's stated intent, we find it strange that they rejected our amendment to explicitly require this data to be considered, rather than automatically deemed to be the best, sight unseen.

By dictating what constitutes sound science based on its source rather than its merit, this bill creates more problems than it solves. The decision on whether or not any particular study or data set has scientific merit with respect to an individual species listing should be made in the context of on-the-ground conservation work, not by politicians in Washington, DC. For these reasons, we oppose H.R. 4317 as reported.

PETER DEFAZIO,
Ranking Member, Committee on Natural Resources.
RAÚL M. GRIJALVA.
JARED HUFFMAN.
ALAN S. LOWENTHAL.
KATHERINE M. CLARK.
MATT CARTWRIGHT.
RUSH HOLT.
GRACE F. NAPOLITANO.

GREGORIO KILILI CAMACHO SABLAN.
ENI F. H. FALEOMAVAEGA.
PEDRO R. PIERLUISI.

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