

21ST CENTURY ENDANGERED SPECIES TRANSPARENCY
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. 4315]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 4315) 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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “21st Century Endangered Species Transparency Act”.

SEC. 2. REQUIREMENT TO PUBLISH ON THE INTERNET THE BASIS FOR LISTINGS.

Section 4(b) of the Endangered Species Act (16 U.S.C. 1533(b)) is amended by adding at the end the following:

“(9) The Secretary shall make publicly available on the Internet the best scientific and commercial data available that are the basis for each regulation, including each proposed regulation, promulgated under subsection (a)(1), except that, at the request of a Governor or legislature of a State, the Secretary shall not make available under this paragraph information regarding which the State has determined public disclosure is prohibited by a law of that State relating to the protection of personal information.”.

PURPOSE OF THE BILL

The purpose of H.R. 4315 is 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.

BACKGROUND AND NEED FOR LEGISLATION

The need for transparency in federal regulations, a principal frequently espoused by the Obama Administration, extends to the Endangered Species Act (ESA). In recent years, the federal agencies responsible for implementing the ESA, the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS), have been processing an increasing number of listing petitions and making an increasing number of federal listing determinations.

For example, as a result of the Department of the Interior's 2011 multi-district litigation settlements, the federal government agreed to make over 750 species listing determinations and critical habitat designations under specific timetables. Since these settlements, already close to 160 new ESA listings have been proposed or finalized, for a total of 1,528 domestic listed species as of the date of this report.

The ESA requires that decisions to list species as threatened or endangered be made "solely on the basis of the best available scientific and commercial data" (See 16 U.S.C. § 1533(b)(1)(A)). However, the data and scientific information cited as support for federal ESA listing decisions, which often include unpublished studies or professional opinions rather than actual data, are frequently not made available or accessible to the public. A substantial amount of the research cited in ESA-related decisions is paid directly or indirectly by the American taxpayers. During the April 30, 2014 markup of this bill, bipartisan comments supported the position that ESA science paid for by the taxpayers should be subject to public review.

H.R. 4315 is intended to correct this problem by requiring the public disclosure of the data used to justify proposed and final regulations to list or delist species as threatened or endangered. Making ESA-related data available and accessible to everyone on the Internet will instill accountability, allow transparent review of data and science to justify important policy considerations, and help ensure that the ESA reflects technology and scientific advances for species recovery not available when the ESA was signed into law or when many of the species were originally listed by the federal government.

Over the past three years, the Committee on Natural Resources held several hearings and has received testimony from multiple witnesses highlighting examples of the lack of transparency of ESA listing decisions and their impacts on species conservation and on affected states, local entities, tribal governments, and private landowners. On August 1, 2013, the Natural Resources Committee held a hearing entitled, "*Transparency and Sound Science Gone Extinct: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People.*" During the hearing, an

expert biologist, Dr. Rob Roy Ramey II, testified in support of H.R. 4315, presented a compelling case for transparency:

What are the effects of this lack of transparency on the public? When the data are not publicly accessible, legitimate scientific inquiry and debate is effectively eliminated, and no independent third party can reproduce the results. This action puts the basis of some ESA decisions outside the realm of science. Furthermore, it has the effect of concentrating power, money and regulatory authority in the hands of those who control access to the data. Information is power.

American people have paid for data collection and research on threatened endangered species through grants, contracts and agreements and permits. They pay the salaries of agency staff who collect, data, publish and produce work based on that data. And they are, for the most part, regulated on the basis of that data. It is essential that the American people have rights to access that data in a timely manner.

The FWS Director Dan Ashe testified at the August 1, 2013, Committee hearing that the process for listings, including any resulting from the Administration's ESA settlements, would be transparent and subject to peer review. However, Dr. Ramey pointed out that "peer reviews are only as good as the information provided to them, and the depth of the questions asked."

ESA data currently maintained in Department of the Interior field offices, and lists of ESA literature, studies and other relevant data posted on a general federal website maintained for regulations, have simply proven insufficient for public transparency and to validate significant ESA decisions. The Committee has received testimony from multiple witnesses that private landowners, local governments and scientists have been unable to obtain data or information cited by these sources.

For example, Mr. Tom Jankovsky, a Garfield County Colorado Commissioner, testified that his County's request for data concerning the Greater Sage Grouse Environmental Impact Statement "has been denied or has not been responded to." Mr. Kent McMullen, a Franklin County, Washington, farmer testified that the FWS failed to properly notify the county and affected private landowners about a proposal to list the White Bluffs bladderpod. He further testified that data cited by the FWS in the proposal was not accessible for public review, and that "references calling for more time for research due to inconclusive data" were "diminished." The County's own commissioned DNA study conducted by an independent university scientist contradicted the FWS' science in the listing.

Concern about the lack of federal ESA data transparency is not limited to listings, but extends to delistings as well. A November 11, 2013, online publication by EcoWatch, featuring the potential de-listing of grizzly bears in the Yellowstone ecosystem, quoted a Center for Biological Diversity spokesperson, Louisa Wilcox, who disputed FWS's use of unpublished studies and unreleased data for grizzly bear populations. Ms. Wilcox stated, "There's no way to know if these are paper bears or real bears, because the govern-

ment has refused to release the taxpayer-funded data and analyses upon which the findings were based.”

H.R. 4315 would not divert resources or create significant new challenges for federal agencies in their implementation of ESA. Increased transparency can provide more effective species recovery and increase the credibility of highly controversial ESA listing decisions. As Dr. Ramey testified before the Committee at a April 8, 2014, hearing, “withholding data does not further the goal of species recovery” and a lack of transparency only empowers “those who have sought to maintain their power, money and authority by withholding scientific and financial data from the public, and this comes at the cost of recovering species.” Data transparency can enhance species recovery by forcing a discussion and debate about data and how species recovery is prioritized. If data are withheld, there is no opportunity for that debate. Specific examples of where data transparency has already led to more effective efforts on species recovery include the California condor, the Boreal toad, and the Peregrine falcon.

H.R. 4315 would not impact current state privacy laws, Department of Defense activities, or require disclosure of commercial or private property information. Similarly, it would not require the disclosure of information that would put species at risk. There is no real evidence that greater information provided to the public regarding species have led to anything other than more protection for those species and their habitat. In addition, current stringent state and federal laws for poaching (federal criminal laws against harming an endangered species are punishable by a fine up to \$50,000 and/or one year imprisonment) provide a strong deterrent against such criminal activity.

COMMITTEE ACTION

H.R. 4315 was introduced on March 27, 2014, by Congressman Doc Hastings (R-WA). 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 Hastings offered an amendment designated .031 to the bill; the amendment was adopted by voice vote. No further amendments were offered, and the bill, as amended, was then adopted and ordered favorably reported to the House of Representatives by a bipartisan roll call vote of 17 to 15, as follows:

Committee on Natural Resources

U.S. House of Representatives

113th Congress

Date: April 30, 2014

Recorded Vote #: 1

Meeting on / Amendment on: **H.R. 4315 - TO REPORT**, Adopted and favorably reported to the House of Representatives, as amended, by a roll call vote of 17 yeas and 15 nays.

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Hastings, WA, Chairman	X			Mr. Duncan of SC			
<i>Mr. DeFazio, OR, Ranking</i>		X		<i>Mr. Cardenas, CA</i>		X	
Mr. Young, AK				Mr. Tipton, CO	X		
<i>Mr. Faleomavaega, AS</i>				<i>Mr. Huffman, CA</i>		X	
Mr. Gohmert, TX				Mr. Gosar, AZ	X		
<i>Mr. Pallone, NJ</i>		X		<i>Mr. Ruiz, CA</i>		X	
Mr. Bishop, UT	X			Mr. Labrador, ID	X		
<i>Mrs. Napolitano, CA</i>		X		<i>Ms. Shea-Porter, NH</i>		X	
Mr. Lamborn, CO	X			Mr. Southerland, FL			
<i>Mr. Holt, NJ</i>				<i>Mr. Lowenthal, CA</i>		X	
Mr. Wittman, VA				Mr. Flores, TX			
<i>Mr. Grijalva, AZ</i>		X		<i>Mr. Garcia, FL</i>			
Mr. Broun, GA	X			Mr. Runyan, NJ	X		
<i>Ms. Bordallo, GU</i>		X		<i>Mr. Cartwright, PA</i>		X	
Mr. Fleming, LA				Mr. Mullin, OK	X		
<i>Mr. Costa, CA</i>	X			<i>Ms. Clark, MA</i>		X	
Mr. McClintock, CA	X			Mr. Daines, MT			
<i>Mr. Sablan, CNMI</i>		X		Mr. Cramer, ND	X		
Mr. Thompson, PA	X			Mr. LaMalfa, CA	X		
<i>Ms. Tsongas, MA</i>		X		Mr. Smith, MO	X		
Mrs. Lummis, WY	X			Mr. McAllister, LA			
<i>Mr. Pierluisi, PR</i>				Mr. Byrne, AL			
Mr. Benishek, MI	X			<i>Vacancy</i>			
<i>Ms. Hanabusa, HI</i>		X					
				TOTALS	17	15	

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. 4315—21st Century Endangered Species Transparency Act

H.R. 4315 would require the Secretaries of the Interior and Commerce to make publicly available on the Internet data used as the basis for each listing determination under the Endangered Species Act. Based on information regarding the cost of providing documents on public websites, CBO estimates that implementing the legislation would have a negligible effect on the federal budget. Enacting H.R. 4315 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 4315 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 regarding the cost of providing documents on public websites, CBO estimates that implementing the legislation would have a negligible 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 publication on the Internet of the basis for determinations that species are endangered species or threatened species.

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 (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT

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DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) * * *

(b) BASIS FOR DETERMINATIONS.—(1) * * *

* * * * *

(9) The Secretary shall make publicly available on the Internet the best scientific and commercial data available that are the basis for each regulation, including each proposed regulation, promulgated under subsection (a)(1), except that, at the request of a Governor or legislature of a State, the Secretary shall not make available under this paragraph information regarding which the State has determined public disclosure is prohibited by a law of that State relating to the protection of personal information.

* * * * *

DISSENTING VIEWS

H.R. 4315 would require data used for each listing decision under the Endangered Species Act to be made publicly available via the Internet. The Majority contends that the Fish and Wildlife Service and National Marine Fisheries Service have not been transparent in disclosing the underlying “best available scientific and commercial data” used for such decisions. A blanket mandate to make all data publically available, however, will have negative, unanticipated consequences.

The bill could discourage scientists, local governments, states and private landowners from sharing their data with Federal agencies because they oppose having their property and commercial data published online. Further, making species location data publically available would provide a road map to those seeking to illegally poach endangered wildlife or plants. Finally, the bill ignores the fact that when a Federal agency does not pay for the data it is considering in its decision-making, it does not have the authority to release it. As a result, legislation claiming to produce better scientific data could end up reducing the amount and quality of the data available.

An amendment adopted by the Committee only begins to address these concerns by exempting “personal information” from the public disclosure requirement; personal information is just the tip of the iceberg. Putting aside for a moment the fact that “personal information” is not defined, the many other classes of information mentioned previously would still not be protected.

This bill serves the same purpose as the Majority’s endless, wasteful document requests and subpoenas: to gum up the works and make it harder for the agencies to focus on species recovery. Its breadth and ambiguity also create new, fertile ground for lawsuits—something the Majority has claimed it wants to limit. The amendment is not enough to address these concerns, and therefore we oppose the bill as reported.

PETER A. DEFazio,
RAÚL M. GRIJALVA.
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