

114TH CONGRESS
2D SESSION

H. R. 5281

To amend the Endangered Species Act of 1973 to permit Governors of States to regulate intrastate endangered species and intrastate threatened species, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 18, 2016

Mr. LUETKEMEYER introduced the following bill; which was referred to the Committee on Natural Resources

A BILL

To amend the Endangered Species Act of 1973 to permit Governors of States to regulate intrastate endangered species and intrastate threatened species, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Endangered Species
5 Management Self-Determination Act”.

6 **SEC. 2. DEFINITION OF ESA.**

7 In this Act, the term “ESA” means the Endangered
8 Species Act of 1973 (16 U.S.C. 1531 et seq.).

1 **SEC. 3. FINDINGS.**

2 Congress finds that—

3 (1) the ESA was passed in 1973 as a means of
4 protecting and recovering species and has not been
5 substantially revised in over 25 years;

6 (2) the ESA has not achieved its stated goal of
7 recovering threatened species or endangered species;

8 (3) of the species listed in accordance with the
9 ESA, less than 1 percent of the total number of spe-
10 cies in the United States have been recovered and
11 removed from the list, largely due to data errors or
12 other factors;

13 (4) there is—

14 (A) no comprehensive independent study of
15 the costs or benefits of the ESA;

16 (B) no full accounting of how much the
17 Federal Government and State and local gov-
18 ernments spend to implement, enforce, and
19 comply with the ESA; and

20 (C) no meaningful effort to account for the
21 costs the ESA imposes on the private sector;

22 (5) the ESA effectively penalizes landowners for
23 owning endangered species habitat by forcing them
24 to bear the cost of conservation;

25 (6) the regulatory listing process under the
26 ESA has become a tool for environmentalists to un-

dermine, slow down, or halt construction of infrastructure projects, hampering economic growth and employment; and

(7) litigation stemming from the ESA and some resulting settlements between the litigants and the Federal Government have made the ESA even more unworkable, to the detriment of species.

**SEC. 4. DETERMINATIONS OF ENDANGERED SPECIES AND
THREATENED SPECIES.**

(a) PROCESS.—Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended—

(1) in subsection (a)—

(A) in paragraph (1), by inserting “, with the consent of the Governor of each State in which the endangered species or threatened species is present,” after “The Secretary”; and

(B) in paragraph (2)(A)(ii), by inserting “, with the consent of the Governor of each State in which the endangered species or threatened species is present,” after “, who”;

(2) in subsection (b)—

(A) by striking paragraph (3);

(B) by redesignating paragraphs (4) through (8) as paragraphs (3) through (7), respectively;

1 (C) in paragraph (3) (as so redesignated),
2 by striking “paragraphs (5) and (6) of this sub-
3 section” and inserting “paragraphs (4) and
4 (5)”;

5 (D) in paragraph (5)(A) (as so redesign-
6 ated), by striking “paragraph (5)(A)(i)” and
7 inserting “paragraph (4)(A)(i)”;

8 (E) in paragraph (6) (as so redesignated),
9 by striking “paragraph (4), (5), or (6) of this
10 subsection” and inserting “paragraph (3), (4),
11 or (5)”;

12 (F) by adding at the end the following:

13 “(8) DEFINITION OF BEST SCIENTIFIC AND
14 COMMERCIAL DATA.—In this subsection, the term
15 ‘best scientific and commercial data’ includes any
16 scientific evidence made available to the Secretary by
17 any State agency.”;

18 (3) by striking subsection (c) and inserting the
19 following:

20 “(c) LISTS.—

21 “(1) DEFINITION OF JOINT RESOLUTION.—In
22 this subsection, the term ‘joint resolution’ means
23 only a joint resolution the matter after the resolving
24 clause of which is as follows: ‘That Congress ap-
25 proves the lists relating to endangered species and

1 threatened species submitted by the Secretary of the
2 Interior on _____.’ (the blank space being
3 appropriately filled in).

4 “(2) LISTS SUBMITTED TO CONGRESS.—The
5 Secretary of the Interior shall submit to Congress—

6 “(A) a list of all species determined by the
7 Secretary of the Interior or the Secretary of
8 Commerce to be endangered species; and

9 “(B) a list of all species determined by the
10 Secretary of the Interior or the Secretary of
11 Commerce to be threatened species.

12 “(3) CONGRESSIONAL APPROVAL.—The lists de-
13 scribed in paragraph (2) shall not take effect until
14 a joint resolution described in paragraph (1) is en-
15 acted.

16 “(4) CONTENTS OF LISTS.—Each list described
17 in paragraph (2) shall—

18 “(A) refer to the species included on the
19 list by any scientific and common name; and

20 “(B) specify—

21 “(i) with respect to the species over
22 what portion of the range of the species
23 that the species is endangered or threat-
24 ened; and

1 “(ii) any critical habitat within the
2 range.

3 “(5) PUBLICATION.—The Secretary of the Inte-
4 rior shall publish in the Federal Register each list
5 approved in accordance with paragraph (3).

6 “(6) AUTOMATIC REMOVAL.—

7 “(A) IN GENERAL.—On the date that is 5
8 years after the date on which a joint resolution
9 is enacted in accordance with this subsection,
10 each species listed on a list approved by the
11 joint resolution shall be removed from the list.

12 “(B) PETITION FOR RELISTING.—

13 “(i) IN GENERAL.—The Secretary of
14 the Interior, in consultation with the Gov-
15 ernor of each State in which the endan-
16 gered species or threatened species is
17 present, may submit to Congress a list
18 that includes any species that was removed
19 under subparagraph (A).

20 “(ii) CONGRESSIONAL APPROVAL.—
21 The list described in clause (i) shall not
22 take effect until a joint resolution de-
23 scribed in paragraph (1) is enacted.”;

24 (4) in subsection (d) —

1 (A) in the first sentence, by striking
2 “Whenever any species” and inserting “Except
3 as provided in subsection (j), whenever any spe-
4 cies”; and

5 (B) in the second sentence, by striking
6 “The Secretary may” and inserting “Except as
7 provided in subsection (j), the Secretary may”;

8 (5) in subsection (f)(1), by striking “The Sec-
9 retary shall” and inserting “Except as provided in
10 subsection (j), the Secretary shall”;

11 (6) in subsection (g)—

12 (A) in paragraph (1), by striking “The
13 Secretary shall” and inserting “Except as pro-
14 vided in subsection (j), the Secretary shall”;
15 and

16 (B) in paragraph (2), by striking “para-
17 graph 7 of subsection (b) of this section” and
18 inserting “subsection (b)(6)”;

19 (7) in subsection (h)—

20 (A) in the matter preceding paragraph (1),
21 by striking “The Secretary shall” and inserting
22 “Except as provided in subsection (j), the Sec-
23 retary shall”;

24 (B) by striking paragraphs (1) and (2);
25 and

1 (C) by redesignating paragraphs (3) and
 2 (4) as paragraphs (1) and (2), respectively;
 3 (8) in subsection (i)—

4 (A) by striking “subsection (b)(5)(A)(ii) of
 5 this section” and inserting “subsection
 6 (b)(4)(A)(ii)”;

7 (B) by striking “or if the Secretary fails to
 8 adopt a regulation pursuant to an action peti-
 9 tioned by a State agency under subsection
 10 (b)(3),”; and

11 (C) by striking “or petition”; and
 12 (9) by adding at the end the following:

13 “(j) INTRASTATE ENDANGERED SPECIES OR
 14 THREATENED SPECIES.—

15 “(1) DEFINITIONS.—In this subsection:

16 “(A) GOVERNOR OF A STATE.—The term
 17 ‘Governor of a State’ means the Governor of a
 18 State in which an intrastate endangered species
 19 or intrastate threatened species is present.

20 “(B) INTRASTATE ENDANGERED SPE-
 21 CIES.—The term ‘intrastate endangered species’
 22 means an endangered species that the Governor
 23 of a State determines is present only within the
 24 State.

1 “(C) INTRASTATE THREATENED SPE-
 2 CIES.—The term ‘intrastate threatened species’
 3 means a threatened species that the Governor
 4 of a State determines is present only within the
 5 State.

6 “(2) CURRENTLY LISTED SPECIES.—

7 “(A) IN GENERAL.—The Governor of a
 8 State may regulate any intrastate endangered
 9 species or any intrastate threatened species list-
 10 ed under this section that is listed before the
 11 date of enactment of this subsection.

12 “(B) AUTHORITY OF GOVERNOR.—If the
 13 Governor of a State elects to regulate an intra-
 14 state endangered species or an intrastate
 15 threatened species under subparagraph (A), the
 16 Governor of the State shall, with respect to the
 17 management of the intrastate endangered spe-
 18 cies or intrastate threatened species on any
 19 land within the State, have the exclusive au-
 20 thority to, in accordance with the purposes and
 21 policy of this Act—

22 “(i) promulgate or enforce any regula-
 23 tion or guidance;

24 “(ii) designate a critical habitat;

25 “(iii) issue a permit or license;

1 “(iv) develop or implement a recovery
2 plan; and

3 “(v) establish any goal with respect to
4 the recovery plan.

5 “(C) APPLICABLE LAW.—The management
6 described in subparagraph (B) shall be subject
7 to the law of the State in which the land, in-
8 cluding public lands (as defined in section 103
9 of the Federal Land Policy and Management
10 Act of 1976 (43 U.S.C. 1702)), is located.

11 “(3) NEWLY LISTED SPECIES.—

12 “(A) IN GENERAL.—The Governor of a
13 State may, before the Secretary or any other
14 person, regulate any intrastate endangered spe-
15 cies or any intrastate threatened species listed
16 under this section that is listed on or after the
17 date of enactment of this subsection.

18 “(B) APPLICABILITY.—If the Governor of
19 a State elects to regulate an intrastate endan-
20 gered species or an intrastate threatened spe-
21 cies under subparagraph (A), subparagraphs
22 (B) and (C) of paragraph (2) shall apply.

23 “(C) JUDICIAL REVIEW.—Any action by
24 the Governor of a State under this subsection
25 shall not be subject to judicial review in any

1 court of the United States or in any State
2 court.”.

3 (b) REQUIREMENT TO PUBLISH ON THE INTERNET
4 THE BASIS FOR LISTINGS.—Section 4(b) of the Endan-
5 gered Species Act of 1973 (16 U.S.C. 1533(b)) is further
6 amended by adding at the end the following:

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

17 **SEC. 5. COST ACCOUNTING.**

18 The Endangered Species Act of 1973 is amended by
19 inserting after section 12 (16 U.S.C. 1541) the following:

20 **“SEC. 12A. COST ACCOUNTING REPORT.**

21 “(a) DEFINITIONS.—In this section:

22 “(1) DIRECT COSTS.—The term ‘direct costs’
23 includes—

24 “(A) Federal agency obligations related to
25 the cost of any study;

1 “(B) capital, operation, maintenance, and
2 replacement costs; and

3 “(C) staffing costs.

4 “(2) INDIRECT COSTS.—The term ‘indirect
5 costs’ includes foregone power generation costs and
6 replacement power costs, including the net costs of
7 any transmission of power.

8 “(b) COST OF COMPLIANCE.—

9 “(1) IN GENERAL.—Except with respect to
10 intrastate endangered species or intrastate threat-
11 ened species regulated by a Governor of a State
12 under section 4(j), the Administrator of the Bonne-
13 ville Power Administration, the Administrator of the
14 Southeastern Power Administration, the Adminis-
15 trator of the Southwestern Power Administration,
16 and the Administrator of the Western Area Power
17 Administration shall each include in a monthly bill-
18 ing statement submitted to each customer of the re-
19 spective Administration the share of the direct and
20 indirect costs to the customer incurred by the Ad-
21 ministration related to complying with this Act.

22 “(2) ASSISTANCE IN IDENTIFYING COSTS.—The
23 Director of the Bureau of Reclamation shall assist
24 the administrators described in paragraph (1) with
25 identifying the costs described in that paragraph.

1 “(c) REPORT.—Not later than January 30 of each
 2 year, each of the administrators described in subsection
 3 (b)(1), in coordination with the Director of the Bureau
 4 of Reclamation, shall submit to the Committee on Envi-
 5 ronment and Public Works of the Senate and the Com-
 6 mittee on Natural Resources of the House of Representa-
 7 tives a report estimating the costs described in subsection
 8 (b)(1)—

9 “(1) with respect to the Western Area Power
 10 Administration, on a project-by-project basis; and

11 “(2) with respect to the each of the Administra-
 12 tions described in subsection (b)(1) (except the
 13 Western Power Administration), on a systemwide
 14 basis.

15 **“SEC. 12B. PROPERTY RIGHTS.**

16 “(a) DETERMINATION OF PROPOSED USE OF REAL
 17 PROPERTY.—

18 “(1) IN GENERAL.—Any owner or lessee of any
 19 real property may submit to the Secretary of the In-
 20 terior an application that includes any proposed use
 21 of the real property.

22 “(2) DETERMINATION.—

23 “(A) IN GENERAL.—Not later than 90
 24 days after the date on which the application de-
 25 scribed in paragraph (1) is submitted, the Sec-

1 retary of the Interior shall submit to the owner
2 or lessee in writing a determination as to
3 whether the proposed use will violate any provi-
4 sion of this Act.

5 “(B) FAILURE TO RESPOND.—If the Sec-
6 retary of the Interior fails to respond before the
7 expiration of the 90-day period described in
8 subparagraph (A), the proposed use shall be
9 considered to not violate any provision of this
10 Act.

11 “(3) EFFECT OF DETERMINATIONS.—

12 “(A) AFFIRMATIVE DEFENSE.—It is an af-
13 firmative defense to any civil penalty assessed
14 under section 11 or to any civil action, civil
15 suit, or prosecution brought under that section
16 that the owner or lessee of real property reason-
17 ably relied on a determination, including a de-
18 termination that resulted under paragraph
19 (2)(B), that a proposed use will not violate any
20 provision of this Act.

21 “(B) COMPENSATION FOR UNFAVORABLE
22 DETERMINATIONS.—If the Secretary of the In-
23 terior determines that a proposed use will vio-
24 late a provision of this Act, the owner or lessee

1 of the real property may seek compensation in
2 accordance with subsection (b).

3 “(b) COMPENSATION FOR AGENCY ACTIONS.—

4 “(1) DEFINITIONS.—In this subsection:

5 “(A) AGENCY ACTION.—

6 “(i) IN GENERAL.—The term ‘agency
7 action’ means any action taken by the Di-
8 rector of the United States Fish and Wild-
9 life Service in accordance with this Act
10 that diminishes the fair market value of
11 any real property by not less than 50 per-
12 cent with respect to the intended use of the
13 real property.

14 “(ii) EXCLUSION.—The term ‘agency
15 action’ does not include any action taken
16 with respect to intrastate endangered spe-
17 cies or intrastate threatened species regu-
18 lated by a Governor of a State under sec-
19 tion 4(j).

20 “(B) LESSEE.—The term ‘lessee’ means a
21 lessee of any real property affected by an agen-
22 cy action.

23 “(C) OWNER.—The term ‘owner’ means an
24 owner of any real property affected by an agen-
25 cy action.

1 “(2) COMPENSATION.—Except as provided in
2 paragraph (3)(B), not later than 180 days after the
3 date on which an agency action takes place, the Sec-
4 retary shall pay an owner or lessee an amount equal
5 to 150 percent of the fair market value of the real
6 property determined in accordance with paragraph
7 (3).

8 “(3) DETERMINATION OF FAIR MARKET
9 VALUE.—

10 “(A) IN GENERAL.—The fair market value
11 described in paragraph (2) shall be determined
12 by 2 licensed independent appraisers of whom—

13 “(i) one shall be chosen by the Sec-
14 retary; and

15 “(ii) one shall be chosen by the owner
16 or lessee.

17 “(B) FAILURE TO AGREE ON FAIR MARKET
18 VALUE.—

19 “(i) IN GENERAL.—If the appraisers
20 chosen under subparagraph (A) fail to
21 agree on the same fair market value, the
22 Secretary and the owner shall jointly select
23 an additional licensed independent ap-
24 praiser to determine the fair market value.

1 “(ii) EXTENSION OF TIME TO MAKE
 2 DETERMINATION.—The licensed inde-
 3 pendent appraiser described in clause (i)
 4 shall determine the fair market value not
 5 later than 270 days after the date on
 6 which the agency action takes place.

7 “(C) COSTS.—The Secretary shall be re-
 8 sponsible for all costs relating to the determina-
 9 tion of fair market value made under this para-
 10 graph.”.

11 **SEC. 6. PENALTIES AND ENFORCEMENT.**

12 Section 11(g)(4) of the Endangered Species Act of
 13 1973 (16 U.S.C. 1540(g)(4)) is amended by striking “at-
 14 torney and”.

15 **SEC. 7. CONFORMING AMENDMENT.**

16 Section 6(d)(1) of the Endangered Species Act of
 17 1973 (16 U.S.C. 1535(d)(1)) is amended by striking “the
 18 status of candidate species pursuant to subparagraph (C)
 19 of section 4(b)(3) and”.

20 **SEC. 8. DISCLOSURE OF EXPENDITURES UNDER ENDAN-**
 21 **GERED SPECIES ACT OF 1973.**

22 (a) REQUIREMENT TO DISCLOSE.—Section 13 of the
 23 Endangered Species Act of 1973 (87 Stat. 902; relating
 24 to conforming amendments which have executed) is
 25 amended to read as follows:

1 **“SEC. 13. DISCLOSURE OF EXPENDITURES.**

2 “(a) REQUIREMENT.—The Secretary of the Interior,
3 in consultation with the Secretary of Commerce, shall—

4 “(1) not later than 90 days after the end of
5 each fiscal year, submit to the Committee on Nat-
6 ural Resources of the House of Representatives and
7 the Committee on Energy and Natural Resources of
8 the Senate an annual report detailing Federal Gov-
9 ernment expenditures for covered suits during the
10 preceding fiscal year (including the information de-
11 scribed in subsection (b)); and

12 “(2) make publicly available through the Inter-
13 net a searchable database of the information de-
14 scribed in subsection (b).

15 “(b) INCLUDED INFORMATION.—The report shall in-
16 clude—

17 “(1) the case name and number of each covered
18 suit, and a hyperlink to the record or decision for
19 each covered suit (if available);

20 “(2) a description of the claims in each covered
21 suit;

22 “(3) the name of each covered agency whose ac-
23 tions gave rise to a claim in a covered suit;

24 “(4) funds expended by each covered agency
25 (disaggregated by agency account) to receive and re-
26 spond to notices referred to in section 11(g)(2) or to

1 prepare for litigation of, litigate, negotiate a settle-
2 ment agreement or consent decree in, or provide ma-
3 terial, technical, or other assistance in relation to, a
4 covered suit;

5 “(5) the number of full-time equivalent employ-
6 ees that participated in the activities described in
7 paragraph (4); and

8 “(6) expenses (disaggregated by agency ac-
9 count) awarded in covered suits, including any con-
10 sent decrees or settlement agreements (regardless of
11 whether a decree or settlement agreement is sealed
12 or otherwise subject to nondisclosure provisions), in-
13 cluding the bases for such awards.

14 “(c) REQUIREMENT TO PROVIDE INFORMATION.—
15 The head of each covered agency shall provide to the Sec-
16 retary in a timely manner all information requested by the
17 Secretary to comply with the requirements of this section.

18 “(d) LIMITATION ON DISCLOSURE.—Notwith-
19 standing any other provision of this section, this section
20 shall not affect any restriction in a consent decree or set-
21 tlement agreement on the disclosure of information that
22 is not described in subsection (b).

23 “(e) DEFINITIONS.—

24 “(1) COVERED AGENCY.—The term ‘covered
25 agency’ means any agency of the Department of the

1 Interior, the Forest Service, the National Marine
2 Fisheries Service, the Bonneville Power Administra-
3 tion, the Western Area Power Administration, the
4 Southwestern Power Administration, or the South-
5 eastern Power Administration.

6 “(2) COVERED SUIT.—The term ‘covered suit’
7 means any civil action containing a claim against the
8 Federal Government, in which the claim arises under
9 this Act and is based on the action of a covered
10 agency.”.

11 (b) CLERICAL AMENDMENT.—The table of contents
12 in the first section of such Act is amended by striking the
13 item relating to such section and inserting the following:

“Sec. 13. Disclosure of expenditures.”.

14 (c) PRIOR AMENDMENTS NOT AFFECTED.—This sec-
15 tion shall not be construed to affect the amendments made
16 by section 13 of such Act, as in effect before the enact-
17 ment of this Act.

○