

115TH CONGRESS
2D SESSION

S. 2587

To amend the Endangered Species Act of 1973 to establish a program to allow States to assume certain Federal responsibilities under that Act with respect to agency actions applicable to highway projects within the States, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 21, 2018

Mr. CORNYN (for himself, Mr. HATCH, and Mr. SULLIVAN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Endangered Species Act of 1973 to establish a program to allow States to assume certain Federal responsibilities under that Act with respect to agency actions applicable to highway projects within the States, 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. ASSUMPTION BY STATES OF CERTAIN ESA RE-**
4 **SPONSIBILITIES.**

5 (a) IN GENERAL.—The Endangered Species Act of
6 1973 is amended by inserting after section 6 (16 U.S.C.
7 1535) the following:

1 **“SEC. 6A. ASSUMPTION BY STATES OF CERTAIN RESPON-**
2 **SIBILITIES RELATING TO HIGHWAY**
3 **PROJECTS.**

4 “(a) ESTABLISHMENT.—

5 “(1) IN GENERAL.—The Secretary shall carry
6 out an assignment program (referred to in this sec-
7 tion as the ‘program’) to allow States to assume cer-
8 tain responsibilities of the Secretary with respect to
9 agency actions applicable to highway projects within
10 the State.

11 “(2) ASSUMPTION OF RESPONSIBILITY.—

12 “(A) IN GENERAL.—Subject to the other
13 requirements of this section, on written agree-
14 ment of the Secretary and a State (which may
15 be in the form of a memorandum of under-
16 standing), the Secretary may assign, and the
17 State may assume, the responsibilities of the
18 Secretary under subsections (a) and (b) of sec-
19 tion 7 with respect to agency actions (as de-
20 fined in subsection (a)(2) of that section) that
21 are applicable to one or more highway projects
22 in the State.

23 “(B) ADDITIONAL RESPONSIBILITY.—

24 “(i) IN GENERAL.—If a State as-
25 sumes responsibility under subparagraph
26 (A)—

1 “(I) the Secretary may assign to
2 the State, and the State may assume,
3 all or part of the responsibilities of
4 the Secretary described in that sub-
5 paragraph for environmental review,
6 consultation, or other action required
7 under any Federal environmental law
8 pertaining to the review or approval of
9 highway projects described in the
10 agreement referred to in that sub-
11 paragraph; and

12 “(II) subject to clause (ii), on the
13 request of the State, the Secretary
14 may also assign to the State, and the
15 State may assume, the responsibilities
16 of the Secretary described in that sub-
17 paragraph for one or more railroad,
18 public transportation, or multimodal
19 projects within the State.

20 “(ii) EXCLUSION OF PROJECTS.—In
21 any State that assumes a responsibility of
22 the Secretary under clause (i)(II), a recipi-
23 ent of assistance under chapter 53 of title
24 49, United States Code, may submit to the
25 Secretary a request that the Secretary

1 shall maintain the responsibility of the
2 Secretary with respect to one or more pub-
3 lic transportation projects carried out by
4 the recipient in the State.

5 “(C) PROCEDURAL AND SUBSTANTIVE RE-
6 QUIREMENTS.—A State shall assume responsi-
7 bility under this section subject to the same
8 procedural and substantive requirements as
9 would apply if the responsibility were carried
10 out by the Secretary.

11 “(D) FEDERAL RESPONSIBILITY.—Any re-
12 sponsibility of the Secretary that is not explic-
13 itly assumed by a State by written agreement
14 under this section shall remain the responsi-
15 bility of the Secretary.

16 “(E) NO EFFECT ON AUTHORITY.—Noth-
17 ing in this section preempts or interferes with
18 any power, jurisdiction, responsibility, or au-
19 thority of a Federal agency (other than the
20 United States Fish and Wildlife Service), except
21 with respect to an authority delegated by the
22 Secretary pursuant to subparagraph (A) under
23 applicable law regarding a project or agency ac-
24 tion described in subparagraph (A) or (B).

1 “(F) PRESERVATION OF FLEXIBILITY.—

2 The Secretary may not require a State, as a
3 condition of participation in the program, to
4 forgo a project delivery method that is other-
5 wise permissible for a project described in sub-
6 paragraph (A) or (B).

7 “(G) LEGAL FEES.—A State that assumes
8 a responsibility of the Secretary under this sec-
9 tion for a project described in subparagraph (A)
10 or (B) may use funds apportioned to the State
11 under section 104(b)(2) of title 23, United
12 States Code, as necessary, for attorneys’ fees
13 directly attributable to eligible activities associ-
14 ated with the project.

15 “(b) STATE PARTICIPATION.—

16 “(1) PARTICIPATING STATES.—To be eligible to
17 participate in the program, a State shall—

18 “(A) be participating in the surface trans-
19 portation project delivery program under sec-
20 tion 327 of title 23, United States Code; and

21 “(B) assume the responsibilities of the
22 Secretary of Transportation under the National
23 Environmental Policy Act of 1969 (42 U.S.C.
24 4321 et seq.) pursuant to that section.

1 “(2) APPLICATION.—Not later than 270 days
2 after the date of enactment of this section, the Sec-
3 retary shall amend, as appropriate, regulations that
4 establish requirements relating to information re-
5 quired in any application of a State to participate in
6 the program, including, at a minimum—

7 “(A) the projects or classes of projects for
8 which the State anticipates exercising the au-
9 thority that may be granted under the program;

10 “(B) verification of the financial resources
11 necessary to carry out the authority that may
12 be granted under the program; and

13 “(C) evidence of the notice and solicitation
14 of public comment by the State relating to par-
15 ticipation of the State in the program, including
16 copies of comments received from that sollicita-
17 tion.

18 “(3) PUBLIC NOTICE.—

19 “(A) IN GENERAL.—Each State that sub-
20 mits an application in accordance with the reg-
21 ulations described in paragraph (2) shall give
22 notice of the intent of the State to participate
23 in the program by not later than 30 days before
24 the date of submission of the application.

1 “(B) METHOD OF NOTICE AND SOLICITA-
 2 TION.—The State shall provide notice and so-
 3 licit public comment under this paragraph by
 4 publishing the complete application of the State
 5 in accordance with the appropriate public notice
 6 requirements of the State.

7 “(4) SELECTION CRITERIA.—The Secretary
 8 may approve the application of a State under this
 9 subsection only if—

10 “(A) any necessary changes to regulations
 11 pursuant to paragraph (2) have been carried
 12 out;

13 “(B) the Secretary determines that the
 14 State has the capability, including financial and
 15 personnel, to assume the responsibility; and

16 “(C) the head of the State agency with pri-
 17 mary jurisdiction over highway matters enters
 18 into a written agreement with the Secretary, as
 19 described in subsection (c).

20 “(5) OTHER FEDERAL AGENCY VIEWS.—If a
 21 State applies to assume a responsibility of the Sec-
 22 retary that would have required the Secretary to
 23 consult with another Federal agency, the Secretary
 24 shall solicit the views of the Federal agency before

1 approving the application of the State under this
2 subsection.

3 “(c) WRITTEN AGREEMENT.—A written agreement
4 under this section shall—

5 “(1) be executed by—

6 “(A) the Governor of the applicable State;

7 or

8 “(B) the top-ranking transportation offi-
9 cial in the State who is charged with responsi-
10 bility for highway construction;

11 “(2) be in such form as the Secretary may re-
12 quire;

13 “(3) provide that the State—

14 “(A) agrees to assume all or part of the re-
15 sponsibilities of the Secretary referred to in
16 subsection (a);

17 “(B) expressly consents, on behalf of the
18 State, to accept the jurisdiction of the Federal
19 courts for the compliance, discharge, and en-
20 forcement of any responsibility of the Secretary
21 assumed by the State;

22 “(C) certifies that State laws (including
23 regulations) are in effect that—

1 “(i) authorize the State to take the
 2 actions necessary to carry out the respon-
 3 sibilities being assumed; and

4 “(ii) are comparable to section 552 of
 5 title 5, United States Code, including pro-
 6 viding that any decision regarding the pub-
 7 lic availability of a document under those
 8 State laws is reviewable by a court of com-
 9 petent jurisdiction; and

10 “(D) agrees to maintain the financial re-
 11 sources necessary to carry out the responsibil-
 12 ities being assumed;

13 “(4) require the State to provide to the Sec-
 14 retary any information the Secretary reasonably con-
 15 siders necessary to ensure that the State is ade-
 16 quately carrying out the responsibilities assigned to
 17 the State;

18 “(5) have a term of not more than 5 years; and

19 “(6) be renewable.

20 “(d) JURISDICTION.—

21 “(1) IN GENERAL.—The United States district
 22 courts shall have exclusive jurisdiction over any civil
 23 action against a State for failure to carry out any
 24 responsibility assumed by the State pursuant to this
 25 section.

1 “(2) LEGAL STANDARDS AND REQUIRE-
2 MENTS.—A civil action under paragraph (1) shall be
3 governed by the legal standards and requirements
4 that would apply in such a civil action against the
5 Secretary had the Secretary taken the actions in
6 question.

7 “(3) INTERVENTION.—The Secretary shall have
8 the right to intervene in any action described in
9 paragraph (1).

10 “(e) EFFECT OF ASSUMPTION OF RESPONSI-
11 BILITY.—A State that assumes responsibility under sub-
12 section (a)(2) shall be solely responsible and solely liable
13 for carrying out, in lieu of, and without further approval
14 of, the Secretary, those responsibilities, until the date on
15 which the program is terminated in accordance with sub-
16 section (j).

17 “(f) LIMITATIONS ON AGREEMENTS.—Nothing in
18 this section permits a State to assume any rulemaking au-
19 thority of the Secretary under any Federal law.

20 “(g) AUDITS.—

21 “(1) IN GENERAL.—To ensure compliance by a
22 State with an agreement of the State under sub-
23 section (c) (including compliance by the State with
24 all Federal laws for which responsibility is assumed

1 under subsection (a)(2)), for each State partici-
2 pating in the program, the Secretary shall—

3 “(A) not later than 180 days after the date
4 of execution of the applicable agreement, meet
5 with the State—

6 “(i) to review the implementation of
7 the agreement; and

8 “(ii) to discuss plans for the first an-
9 nual audit;

10 “(B) conduct annual audits during each of
11 the first 4 years of State participation in the
12 program; and

13 “(C) ensure that the time period for com-
14 pleting an annual audit, from initiation to com-
15 pletion (including public comment and re-
16 sponses to those comments), does not exceed
17 180 days.

18 “(2) PUBLIC AVAILABILITY AND COMMENT.—

19 “(A) IN GENERAL.—An audit conducted
20 under paragraph (1) shall be provided to the
21 public for comment.

22 “(B) RESPONSE.—Not later than 60 days
23 after the date on which the period for public
24 comment ends, the Secretary shall respond to

1 public comments received under subparagraph
2 (A).

3 “(3) AUDIT TEAM.—

4 “(A) IN GENERAL.—An audit conducted
5 under paragraph (1) shall be carried out by an
6 audit team determined by the Secretary, in con-
7 sultation with the State, in accordance with
8 subparagraph (B).

9 “(B) CONSULTATION.—Consultation with
10 the State under subparagraph (A) shall include
11 a reasonable opportunity for the State to re-
12 view, and provide comments regarding, the pro-
13 posed members of the audit team.

14 “(h) MONITORING.—After the end of the fourth year
15 of the participation by a State in the program, the Sec-
16 retary shall monitor compliance by the State with the writ-
17 ten agreement under subsection (c), including the provi-
18 sion by the State of financial resources to carry out the
19 written agreement.

20 “(i) REPORT TO CONGRESS.—The Secretary shall
21 submit to Congress an annual report that describes the
22 administration of the program during the preceding cal-
23 endar year.

24 “(j) TERMINATION.—

1 “(1) TERMINATION BY SECRETARY.—The Sec-
2 retary may terminate the participation of a State in
3 the program if—

4 “(A) the Secretary determines that the
5 State is not adequately carrying out the respon-
6 sibilities assigned to the State pursuant to this
7 section;

8 “(B) the Secretary provides to the State—

9 “(i) a notification of the determina-
10 tion of noncompliance;

11 “(ii) a period of not less than 120
12 days to take such corrective action as the
13 Secretary determines to be necessary to
14 comply with the applicable agreement; and

15 “(iii) on request of the Governor of
16 the State, a detailed description of each re-
17 sponsibility in need of corrective action re-
18 garding an inadequacy identified under
19 subparagraph (A); and

20 “(C) the State, after the notification and
21 period for corrective action provided under sub-
22 paragraph (B), fails to take satisfactory correc-
23 tive action, as determined by the Secretary.

24 “(2) TERMINATION BY STATE.—The State may
25 terminate the participation of the State in the pro-

1 gram at any time by providing to the Secretary a
2 notice, by not later than the date that is 90 days be-
3 fore the date of termination, subject to such terms
4 and conditions as the Secretary may provide.

5 “(k) CAPACITY BUILDING.—The Secretary, in co-
6 operation with representatives of State officials, may carry
7 out education, training, peer-exchange, and other initia-
8 tives as appropriate—

9 “(1) to assist States in developing the capacity
10 to participate in the program; and

11 “(2) to promote information sharing and col-
12 laboration among States that are participating in
13 the program.

14 “(l) RELATIONSHIP TO LOCALLY ADMINISTERED
15 PROJECTS.—A State granted authority under this section
16 may, as appropriate and on the request of a local govern-
17 ment—

18 “(1) exercise that authority on behalf of the
19 local government for a locally administered project;
20 or

21 “(2) provide guidance and training regarding
22 consolidating and minimizing the documentation and
23 environmental analyses necessary for sponsors of a
24 locally administered project to comply with—

25 “(A) section 7; and

1 “(B) any comparable requirements under
2 State law.”.

3 (b) CONFORMING AMENDMENTS.—Section 7 of the
4 Endangered Species Act of 1973 (16 U.S.C. 1536) is
5 amended—

6 (1) in subsection (a)—

7 (A) by striking paragraph (1) and insert-
8 ing the following:

9 “(1) FEDERAL AGENCY ACTIONS.—

10 “(A) IN GENERAL.—The Secretary shall—

11 “(i) review other programs adminis-
12 tered by the Secretary; and

13 “(ii) use those programs in further-
14 ance of the purposes of this Act.

15 “(B) OTHER AGENCIES.—The head of
16 each other Federal department or agency, in
17 consultation with, and with the assistance of,
18 the Secretary or a State that has assumed a re-
19 sponsibility of the Secretary pursuant to section
20 6A, as applicable, shall use the authorities of
21 the department or agency in furtherance of the
22 purposes of this Act by carrying out programs
23 for the conservation of endangered species and
24 threatened species listed under section 4.”;

25 (B) in paragraph (2)—

1 (i) in the second sentence, by striking
 2 “In fulfilling” and inserting the following:

3 “(B) USE OF DATA.—In fulfilling”; and

4 (ii) by striking the paragraph designa-
 5 tion and all that follows through “not like-
 6 ly” in the first sentence and inserting the
 7 following:

8 “(2) AGENCY ACTIONS.—

9 “(A) IN GENERAL.—The head of each
 10 Federal department or agency, in consultation
 11 with, and with the assistance of, the Secretary
 12 or a State that has assumed a responsibility of
 13 the Secretary pursuant to section 6A, as appli-
 14 cable, shall ensure that any action authorized,
 15 funded, or carried out by the department or
 16 agency (referred to in this section as an ‘agency
 17 action’) is not likely”; and

18 (C) in paragraphs (3) and (4), by inserting
 19 “or a State that has assumed a responsibility of
 20 the Secretary pursuant to section 6A, as appli-
 21 cable,” after “with the Secretary” each place it
 22 appears;

23 (2) in subsection (b)—

24 (A) in paragraph (1)—

1 (i) in subparagraph (A), by striking
 2 “within the 90-day” and all that follows
 3 through the period at the end of the sub-
 4 paragraph and inserting the following:
 5 “within—

6 “(i) the 90-day period beginning on the date on
 7 which the consultation is initiated; or

8 “(ii) subject to subparagraph (B), such other
 9 time period as is mutually agreeable to—

10 “(I) the Secretary or a State that has as-
 11 sumed a responsibility of the Secretary pursu-
 12 ant to section 6A, as applicable; and

13 “(II) the head of the affected Federal de-
 14 partment or agency.”; and

15 (ii) in subparagraph (B)—

16 (I) in the matter preceding clause
 17 (i), by striking “the Federal” and in-
 18 serting “or a State that has assumed
 19 a responsibility of the Secretary pur-
 20 suant to section 6A, as applicable,
 21 and the head of the affected Federal
 22 department or”; and

23 (II) in the undesignated matter
 24 following clause (ii), by striking “The
 25 Secretary” and all that follows

1 through “before” and inserting the
2 following:

3 “(C) APPLICANT CONSENT.—The Sec-
4 retary or a State that has assumed a responsi-
5 bility of the Secretary pursuant to section 6A,
6 as applicable, and the head of the affected Fed-
7 eral department or agency may mutually agree
8 to extend a consultation period established
9 under subparagraph (B) if the Secretary or the
10 State that has assumed responsibility from the
11 Secretary, as applicable, before”;

12 (B) in paragraph (2), by striking “agree-
13 able to” and all that follows through the period
14 at the end of the paragraph and inserting the
15 following: “agreeable to—

16 “(A) the Secretary or a State that has assumed
17 a responsibility of the Secretary pursuant to section
18 6A, as applicable;

19 “(B) the head of the affected Federal depart-
20 ment or agency; and

21 “(C) the applicant concerned.”;

22 (C) in paragraph (3)—

23 (i) in subparagraph (A)—

24 (I) by inserting “or a State that
25 has assumed a responsibility of the

1 Secretary pursuant to section 6A, as
 2 applicable,” after “the Secretary”
 3 each place it appears;

4 (II) in the first sentence, by
 5 striking “the Secretary’s opinion” and
 6 inserting “the opinion of the Sec-
 7 retary or the State, respectively,”; and

8 (III) in the second sentence, by
 9 striking “he believes” and inserting
 10 “the Secretary or the State, respec-
 11 tively, believes”; and

12 (ii) in subparagraph (B)—

13 (I) by striking “an opinion based
 14 by the Secretary incident to” and in-
 15 serting “an opinion of the Secretary
 16 or a State that has assumed a respon-
 17 sibility of the Secretary pursuant to
 18 section 6A, as applicable, based on”;
 19 and

20 (II) by striking “the Secretary
 21 reviews” and inserting “the Secretary
 22 or the State, respectively, reviews”;

23 (D) in paragraph (4)—

24 (i) in the undesignated matter fol-
 25 lowing subparagraph (C), by striking “the

1 Secretary shall provide the Federal agency
 2 and the applicant concerned, if any, with”
 3 and inserting the following:

4 “(5) DESCRIPTION OF WRITTEN STATEMENT.—
 5 A written statement referred to in paragraph (4)
 6 is”;

7 (ii) by striking the paragraph designa-
 8 tion and all that follows through “the Sec-
 9 retary” in the matter preceding subpara-
 10 graph (A) and inserting the following:

11 “(4) REQUIREMENT ON CERTAIN CONCLU-
 12 SION.—The Secretary or a State that has assumed
 13 a responsibility of the Secretary pursuant to section
 14 6A, as applicable, shall provide to the head of the
 15 affected Federal department or agency and the ap-
 16 plicant concerned, if any, a written statement de-
 17 scribed in paragraph (5) if, after consultation under
 18 subsection (a)(2), the Secretary or the State, respec-
 19 tively,”;

20 (iii) in subparagraph (A), by striking
 21 “which the Secretary believes” and insert-
 22 ing “that the Secretary or the State, re-
 23 spectively, believes”; and

1 (iv) in subparagraph (C), by striking
2 the semicolon at the end and inserting
3 “(16 U.S.C. 1371(a)(5)).”; and

4 (E) in paragraph (5) (as designated by
5 subparagraph (D)(i))—

6 (i) in each of clauses (i) and (ii)—

7 (I) by striking “such” each place
8 it appears and inserting “the applica-
9 ble”; and

10 (II) by striking the comma at the
11 end of the clause and inserting a
12 semicolon;

13 (ii) in clause (iii), by striking “with
14 regard to such taking, and” and inserting
15 “(16 U.S.C. 1371(a)(5)) with respect to
16 the applicable taking; and”;

17 (iii) in clause (iv), by striking “clauses
18 (ii) and (iii)” and inserting “subpara-
19 graphs (B) and (C)”; and

20 (iv) by redesignating clauses (i)
21 through (iv) as subparagraphs (A) through
22 (D), respectively, and indenting the sub-
23 paragraphs appropriately;

24 (3) in subsection (e)—

1 (A) in paragraph (3)(D), by striking
 2 “Agency. Agency.” and inserting “Agency.”;
 3 and

4 (B) in paragraph (4)(B), by adding a pe-
 5 riod at the end; and

6 (4) in subsection (f)(1), by inserting “or a
 7 State that has assumed a responsibility of the Sec-
 8 retary pursuant to section 6A, as applicable” after
 9 “the Secretary”.

10 (c) TECHNICAL AMENDMENTS.—The table of con-
 11 tents of the Endangered Species Act of 1973 (16 U.S.C.
 12 1531 note) is amended—

13 (1) by inserting after the item relating to sec-
 14 tion 6 the following:

“Sec. 6A. Assumption by States of certain responsibilities relating to highway
 projects.”;

15 and

16 (2) by adding at the end the following:

“Sec. 18. Annual cost analysis by the Fish and Wildlife Service.”.

