

The Endangered Species Act Amendments of 2018

Section-by-Section Analysis

TITLE I – ENHANCING THE FEDERAL-STATE PARTNERSHIP

Sec. 101. Definitions.

This section defines terms used in the Endangered Species Act Amendments of 2018 (this Act). It requires the Secretary of the Interior (the Secretary) to initiate a rulemaking to define the terms “great weight” and “maximum extent possible,” which are used in this Act to enhance the Secretary’s consultation with the States when implementing the Endangered Species Act (the ESA).

Sec. 102. Recovery teams.

This section requires that each listing rule for a threatened or endangered species under section 4 of the ESA must include recovery goals, habitat objectives, and other criteria established by the Secretary, in consultation with impacted States, that upon fulfillment would lead to a delisting or downlisting. Such factors have to be based on the best scientific and commercial data available and, to the maximum extent practicable, use objective and measureable biological criteria.

This section allows the recovery team to modify a recovery goal, habitat objective, or other criterion established for a species by a unanimous vote based on a material change to the best scientific and commercial data available.

This section requires the Secretary to approve or reject the proposed modification of a recovery goal, habitat objective, or other criterion within 90 days of receiving a proposed modification from the recovery team. If the Secretary rejects a proposed modification, he must provide a written justification to the recovery team, applicable State agencies of impacted States, and Congress.

This section requires that the Secretary initiate a status review of a threatened or endangered species within 30 days after the earlier of the date on which he determines that the recovery goals, habitat objectives, and other criteria for the listed species have been met, or the date on which he receives a report from the recovery team stating that the applicable criteria have been met and recommending delisting or downlisting. The Secretary shall make a determination of whether to delist or downlist the species within 90 days of the initiation of the status review.

This section requires, in the case of a positive determination to delist or downlist a species, that the Secretary publish in the Federal Register a notice of the determination within 30 days, a proposed regulation to delist or downlist within 180 days, and a final regulation to delist or downlist within 1 year, of the date of the determination. A determination to delist will not be subject to judicial review until the expiration of the monitoring period for a delisted species.

This section requires, in the case of a negative determination to delist or downlist a species, that the Secretary provide a written explanation to the recovery team, applicable State agencies of impacted States, and Congress.

This section requires that the Secretary submit to the Governor of each impacted State a notice that includes a solicitation from the impacted State of a request to establish a recovery team within 30 days after the date on which a species is listed as threatened or endangered under the ESA. The impacted State may request the establishment of a recovery team within 30 days of receipt of the notice. The Secretary shall establish a science-based recovery team within 1 year of the date on which an impacted State submits a request for a recovery team, or the date on which the Secretary determines that a recovery team would promote the conservation and survival of the species.

This section requires the membership of a recovery team to include representatives of the U.S. Fish and Wildlife Service or the National Marine Fisheries Service; other relevant Federal land and wildlife management agencies; relevant State and local land and wildlife management agencies from each impacted State who are nominated by the Governor; and, upon the agreement of a majority of members representing the aforementioned groups, appropriately qualified scientists. The number of Federal representatives on a recovery team shall not exceed the number of State and local representatives. A vacancy on a recovery team shall be filled in the same manner as the original appointment.

This section requires the Secretary to solicit from the Governor of each impacted state a request by the impacted State to lead a recovery team within 30 days of the establishment of the recovery team. If multiple impacted States request to lead a recovery team, the Secretary shall designate one of the impacted States to lead the recovery team. This shall be done in accordance with criteria established by the Secretary, in consultation with the States, no later than 180 days after the date of enactment of this Act. If no impacted State requests to lead a recovery team, the Secretary, in consultation with all applicable impacted States, shall lead the recovery team.

This section requires a recovery team to fulfill certain duties, including: developing and implementing a recovery plan; proposing modifications to the recovery plan; and recommending delisting or downlisting of a species once established recovery plan criteria have been satisfied.

Sec. 103. State-Federal consultation relating to conservation and recovery of wildlife.

This section emphasizes that Federal authority should be exercised in conjunction with State authority regarding conservation and management of fish and wildlife under the ESA. It expresses the support of Congress for State-led conservation activities that help preclude the need to list a species under the ESA.

This section requires that the Secretary notify the Governor and the State agency of each impacted State and Indian Tribe within 15 days of the receipt of a petition to list a species under the ESA. It requires the Secretary to solicit comments from the Governor, State agency, or Indian Tribe, as applicable, for submission back to the Secretary within 75 days of the notification by the Secretary. It requires the Secretary to consider and give great weight to any comments.

This section requires the Secretary to provide States the opportunity to: lead recovery planning and implementation; expedite threatened species or endangered species recovery by supporting State-level initiatives and partnerships; and increase flexibility and feasibility for the applicability of recovery plans.

This section requires that, in any case in which a recovery team is not established, the Secretary shall approve the request of an eligible State agency of an impacted State to develop or implement a recovery plan. The Secretary shall designate an eligible state agency of an impacted State as leader of the development or implementation of a recovery plan if the Secretary receives multiple requests from impacted States. The selected leader shall develop or implement the recovery plan in consultation with all other impacted States. If no eligible state agency of an impacted State requests to develop or implement a recovery plan, the Secretary shall do so in consultation with all impacted States.

This section provides that an eligible state agency that develops a recovery plan must submit a draft recovery plan to the Secretary no later than 1 year after the date of its authorization to prepare the recovery plan. It requires the Secretary to determine whether a draft recovery plan meets applicable requirements. If the Secretary approves the draft recovery plan, he shall notify the eligible State agency and publish a notice of availability of the draft recovery plan. If the Secretary disapproves the draft recovery plan, he shall provide the eligible State agency with a notice identifying each deficiency, an opportunity to correct each deficiency, and consultation regarding the development of the recovery plan so that it meets all applicable requirements.

This section requires that, on finalization of a recovery plan, an impacted State may make recommendations to the lead eligible State agency or to the Secretary, as applicable, including recommending proposed modifications to the recovery plan and recommending delisting and downlisting once applicable criteria for the species have been satisfied. A lead eligible State agency shall give great weight to any recommendations received from an impacted State.

This section requires the Secretary, in consultation with States, to establish standards and guidelines for the development and implementation of recovery plans by eligible State agencies.

This section permits the Secretary to withdraw the authorization of an eligible state agency to develop or implement a recovery plan. Prior to taking such action, the Secretary shall provide an eligible State agency notice that the authorization is under review and an opportunity to submit comments regarding the review within 30 days after the date of receipt of the notice. On withdrawal of authorization of an eligible State agency designated as leader of development or implementation of a recovery plan, the Secretary shall designate another eligible State agency as leader. If no additional eligible State agency requested to be leader of development or implementation, the Secretary shall develop or implement, as applicable, the recovery plan.

Sec. 104. Consultation with States regarding land acquisition.

This section requires the Secretaries of the Interior, Commerce, or Agriculture, as applicable, to notify and consult with a State to the maximum extent possible prior to acquiring land within its borders, including prior to proposing the acquisition. It requires the applicable Secretary to give

great weight to the comments received from a State when determining whether to carry out the proposed acquisition.

Sec. 105. Cooperation with States and Indian Tribes.

This section requires the Secretary to consult with the States to the maximum extent possible and to acknowledge and respect the primary authority of State agencies to manage fish and wildlife within their borders. Consultations must be based on the best scientific and commercial data available and include each impacted State, including Indian tribes and Native Corporations.

Sec. 106. State consultation regarding experimental populations.

This section amends section 10(j) of the ESA by requiring the Secretary to establish through an agreement with the State agency of each impacted State the boundaries of the area in each State in which an experimental population of a listed species is authorized to be released. It also requires compliance with the applicable permitting requirements of the State agency of each impacted State in authorizing a release.

Sec. 107. State participation in settlements.

This section amends section 11(g)(2)(C) of the ESA. It requires the Secretary to provide notice to, consult with, and otherwise take appropriate actions to include impacted States and local governments in impacted States when preparing or entering into a settlement or other agreement relating to the Secretary's failure to perform a non-discretionary duty under section 4 of the ESA.

Sec. 108. Award system for State agencies.

This section requires the Secretary to establish an award system under which he may publicly commend up to five State agencies each year for outstanding performance in conserving and recovering wildlife. It requires the Secretary to develop criteria for the award system in consultation with the Association of Fish and Wildlife Agencies and other representatives of State fish and wildlife agencies, including regional groups, State fish and wildlife agencies, and other applicable State agencies.

Sec. 109. State feedback regarding U.S. Fish and Wildlife Service employees.

This section requires the Director of the U.S. Fish and Wildlife Service annually to solicit from the Governor of each State feedback on the performance of the U.S. Fish and Wildlife Service and its employees within their respective borders. The feedback shall be provided by each appropriate State agency tasked with the conservation and management of fish and wildlife. The feedback shall reflect the responsiveness of the U.S. Fish and Wildlife Service to representatives of State and local government and stakeholders who reside in the State. The Governor of each State may petition the Director of the U.S. Fish and Wildlife Service to publicly commend any employee of the U.S. Fish and Wildlife Service for outstanding performance in carrying out duties relating to species conservation, species management, the recovery of threatened and endangered species, and the implementation of the ESA, within the borders of the State.

TITLE II – ENCOURAGING CONSERVATION ACTIVITIES THROUGH REGULATORY CERTAINTY

Sec. 201. Sense of Congress regarding credit for conservation agreements and activities.

This section establishes the sense of Congress that States, Indian Tribes, units of local government, landowners, and other stakeholders should receive credit for enrolling in, and performing obligations under, conservation agreements, as well as investing in, and carrying out, conservation activities, generally. The Secretary should take into account the enrollment in, and performance of obligations under, conservation agreements, and investments in, and carrying out of, general conservation activities by States, Indian Tribes, units of local government, landowners, and other stakeholders in making determinations under the ESA.

Sec. 202. Conservation agreements as regulatory mechanisms.

This section requires that a conservation agreement entered into or endorsed by the Secretary shall be considered a regulatory mechanism for purposes of determining whether to list a species as threatened or endangered under section 4 of the ESA.

Sec. 203. Voluntary wildlife conservation agreements.

This section requires the Secretary to establish procedures for developing and entering into voluntary wildlife conservation agreements, including with state and local governments, private landowners, lessees, and private third party organizations. It requires that any party to such an agreement that is in compliance therewith shall not be required to carry out any additional mitigation measures for a species covered by the agreement, if the additional measure would require any additional expenditure of resources or the adoption of any additional restriction on a land, water, or water-related right of the party. It requires the Secretary to streamline the process for entering into a voluntary wildlife conservation agreement to the maximum extent practicable.

Sec. 204. Candidate conservation agreements with assurances.

This section requires the Secretary to: honor the terms of Candidate Conservation Agreements with Assurances (CCAA); to promulgate regulations to expedite the process for entering into CCAs; to promulgate regulations to protect sensitive personal and business-related information of each party to the agreement; and to consider whether the implementation of the agreement is reasonably expected to preclude or remove any need to list the species. It prohibits the Secretary from considering whether the implementation of the agreement is reasonably expected to provide a net conservation benefit to the species. It prohibits the Secretary from precluding a party to a CCAA from receiving Federal funds under any other conservation program.

This section voids the final rule promulgated by the Secretary of Interior entitled “Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Candidate Conservation Agreements With Assurances” (81 Fed. Reg. 95053).

Sec. 205. Safe harbor agreements.

This section authorizes the Secretary to enter into a Safe Harbor Agreement with a state and local government, private landowner, lessee, private third-party conservation organization, or other entity that shall provide for the taking of any additional threatened or endangered species that is not covered under another agreement and is drawn to the property covered by the Safe Harbor Agreement due to the improved conditions on that property generated by recovery activities for the benefit of the species covered by the Safe Harbor Agreement. It authorizes the Secretary to enter into a Safe Harbor Agreement that may provide for an extension of these protections to neighboring properties not covered by the Safe Harbor Agreement due to the improved conditions on the property covered by the Safe Harbor Agreement generated by recovery activities for the benefit of the species covered by the Safe Harbor Agreement.

TITLE III – STRENGTHENING CONSERVATION DECISIONMAKING THROUGH INCREASED TRANSPARENCY**Sec. 301. Policy relating to best scientific and commercial data available.**

This section establishes a policy relating to best scientific and commercial data available that prohibits the Secretary from disclosing information pursuant to the Freedom of Information Act that includes sensitive information regarding a species, identifies the property of a specific landowner, or includes sensitive personal or business-related information. In any case where the Secretary is required to use the best scientific and commercial data available, he shall, in evaluating comparable data, give greater weight to data that is empirical or that has been field-tested or independently peer reviewed. In any case where the Secretary determines that information provided by a State, Tribal, or local government is deficient in fact and inconsistent with other credible scientific and commercial information, he shall provide a written explanation to the State, Tribal, or local government and Congress, and include the information and written explanation in the administrative record of the listing, critical habitat, or other designation.

Sec. 302. Transparency of information.

This section requires that the Secretary make publicly available on the internet the best scientific and commercial data available that are the basis for each proposed and promulgated regulation. It requires that the Secretary obtain concurrence before publishing information derived from or provided by a State or local government. The Secretary shall obtain consent before publishing any copyrighted material. On request by a State, the Secretary shall not make available information the disclosure of which a State has determined is prohibited by its own laws. The Secretary also shall not disclose any information that may be withheld under the Freedom of Information Act or that would violate the policy relating to best scientific and commercial data available under section 2(d) of this Act.

Sec. 303. Information provided to States.

This section applies to cases where the Secretary has not received a petition to list a species but is considering proposing to list a species at his own discretion. It requires the Secretary: to notify

the Governor and the State agency of each impacted State that he is considering taking such action; to solicit comments from them to be submitted to the Secretary no later than 60 days after the date of receipt of the notification; and to consider and give great weight to such comments before publication of a draft, proposed, final, or emergency regulation to list the species.

Prior to making any determination to list under section 4(a) of the ESA, the Secretary shall: provide to each impacted State all information on which the determination is based; consider, give great weight to, and use State data, analyses, and comments; and accept comments from the Governor, State agency, and any affected local government within an impacted State.

This section requires the Secretary to obtain concurrence from a State or local government that generated or submitted information before providing that information to another State. It requires the Secretary to obtain the consent of the holder of a copyright before publishing copyrighted material. If the copyright holder refuses to provide consent, the Secretary shall provide bibliographic information relating to the material sufficient to ensure that stakeholders can independently obtain the information.

Sec. 304. Transparency in litigation.

This section requires the publication by the Secretary, including electronically, of any complaint filed under section 11(g) of the ESA not later than 30 days after service of process. It requires the Secretary to provide any State, Tribal, or local government the rights of which may be affected by a listing decision a reasonable opportunity to move to intervene. In considering a motion to intervene, the court shall presume, subject to rebuttal, that the parties to the action would not adequately represent the interests of the State, Tribal, or local government.

This section requires the Secretary to provide notice of a proposed settlement to each impacted State and each county in which a species is believed to occur.

This section requires the disclosure by any federal agency of the amount for attorney fees paid to any person in connection with a complaint filed under section 11(g)(1)(C) of the ESA. It requires the Department of Justice to publish an annual report in the Federal Register based on this information.

TITLE IV – OPTIMIZING CONSERVATION THROUGH RESOURCE PRIORITIZATION

Sec. 401. Prioritization of listing petitions, reviews, and determinations.

This section establishes a prioritization system for addressing listing petitions, reviews, and determinations. It requires the Secretary to submit with his annual budget request a national listing work plan that includes: a seven year schedule for completing status reviews and accompanying 12-month findings regarding petitions for listing species; status reviews relating to the species initiated by the Secretary; proposed and final determinations regarding listing the species; and proposed and final critical habitat designations. It also requires the Secretary to include with his budget request the amounts that will be required to carry out future work plans.

This section requires that the Secretary assign each species covered by the work plan a priority classification of Priority 1 through Priority 5 based on the information available and the urgency for action with regard to determining the status of a species under the ESA. Species designated as Priority 1 are given highest priority. Species designated as Priority 5 are given lowest priority.

This section authorizes the Secretary to retain a species assigned a priority classification of Priority 3 through Priority 5 on the workplan for not more than an additional five year period beyond the initial seven year period if the Secretary makes certain determinations, such as, additional time would allow for more complete data collection or the completion of studies relating to the species, or existing conservation efforts continue to meet the conservation needs of the species.

This section authorizes the Secretary to modify a work plan only on an emergency basis and in consultation with each State affected by the modification.

This section provides that, in the case of a species assigned a priority classification on the workplan, the Secretary shall not be required to act on a petition or review regarding the status of a species by any deadline otherwise required by the ESA until the last day of the period on which the workplan to which the species that is the subject of the petition is assigned.

TITLE V – STUDIES TO IMPROVE CONSERVATION

Sec. 501. Definition of Secretaries.

This section defines the use of terms used throughout Title V.

Sec. 502. Feasibility studies.

This section requires the Secretaries of the Interior and Commerce to conduct feasibility studies relating to: protecting habitat located outside of the United States to promote the conservation of a species in the United States that is listed; providing regulatory flexibility to incentivize States, local governments, and private landowners to stock listed species into unoccupied habitat; and providing regulatory flexibility to allow for a multi-species approach to planning, conservation and recovery to improve coordination in cases where multiple species may have conflicting habitat requirements and competing natural resource requirements.

Sec. 503. Studies on determinations to list.

This section requires the Secretaries of the Interior and Commerce to conduct studies to analyze the extent to which their departments have accounted for factors like disease, predation, and invasive species when deciding to list a species as endangered or threatened. The study shall review any factors that threaten and endanger species for which application of the ESA would not improve a species' population. It shall examine and present findings regarding the weight given to factors like disease, predation, and invasive species in listing decisions. It shall make recommendations for ways to improve the inclusion of, and to give appropriate weight to, such factors in the analysis of the best scientific and commercial data available.

Sec. 504. Study and report on expenditures.

This section requires the Comptroller General of the United States to conduct a study, and to submit a report to Congress, regarding the amounts of federal money expended or disbursed for each of fiscal years 2014 through 2018 as a direct result of any provision of the ESA.

This section requires that within one year of enactment of this Act, the head of each federal agency or department must submit a report detailing amounts expended or disbursed by their agency or department. They must present this information according to programmatic office, provision of the ESA, and project or activity.

This section requires that within eighteen months of enactment of this Act, the report detailing the findings of the study shall be submitted to Congress. Not later than 90 days after the initial date of the first session of each Congress thereafter, a report detailing similar findings with respect to the preceding two fiscal year period shall be submitted to Congress.

Sec. 505. Study to quantify litigation expenses.

This section requires the Comptroller General of the United States to conduct a study, and to submit a report to Congress, quantifying the amount of federal resources expended in connection with litigation under the ESA.

TITLE VI – REAUTHORIZATION

Sec. 601. Reauthorization.

This section reauthorizes appropriations for the ESA.