

115TH CONGRESS
1ST SESSION

H. R. 2134

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

APRIL 25, 2017

Mr. LUETKEMEYER (for himself and Mr. SESSIONS) 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. AMENDMENTS TO THE ENDANGERED SPECIES ACT
OF 1973.**

(a) DETERMINATIONS OF ENDANGERED SPECIES AND THREATENED SPECIES.—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);

1 (B) by redesignating paragraphs (4)
 2 through (8) as paragraphs (3) through (7), re-
 3 spectively;

4 (C) in paragraph (3) (as so redesignated),
 5 by striking “paragraphs (5) and (6) of this sub-
 6 section” and inserting “paragraphs (4) and
 7 (5)”;

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

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

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

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

21 (3) by striking subsection (c) and inserting the
 22 following:

23 “(c) LISTS.—

24 “(1) DEFINITION OF JOINT RESOLUTION.—In
 25 this subsection, the term ‘joint resolution’ means

1 only a joint resolution the matter after the resolving
2 clause of which is as follows: ‘That Congress ap-
3 proves the lists relating to endangered species and
4 threatened species submitted by the Secretary of the
5 Interior on _____.’ (the blank space being
6 appropriately filled in).

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

9 “(A) a list of all species determined by the
10 Secretary of the Interior or the Secretary of
11 Commerce to be endangered species; and

12 “(B) a list of all species determined by the
13 Secretary of the Interior or the Secretary of
14 Commerce to be threatened species.

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

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

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

23 “(B) specify—

24 “(i) with respect to the species over
25 what portion of the range of the species

1 that the species is endangered or threat-
2 ened; and

3 “(ii) any critical habitat within the
4 range.

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

8 “(6) AUTOMATIC REMOVAL.—

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

14 “(B) PETITION FOR RELISTING.—

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

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

1 (4) in subsection (d)—

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

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

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

12 (6) in subsection (g)—

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

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

20 (7) in subsection (h)—

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

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

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

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

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

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

15 “(j) INTRASTATE ENDANGERED SPECIES OR
 16 THREATENED SPECIES.—

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

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

22 “(B) INTRASTATE ENDANGERED SPE-
 23 CIES.—The term ‘intrastate endangered species’
 24 means an endangered species that the Governor

1 of a State determines is present only within the
2 State.

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

8 “(2) CURRENTLY LISTED SPECIES.—

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

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

24 “(i) promulgate or enforce any regula-
25 tion or guidance;

1 “(ii) designate a critical habitat;

2 “(iii) issue a permit or license;

3 “(iv) develop or implement a recovery
4 plan; and

5 “(v) establish any goal with respect to
6 the recovery plan.

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

13 “(3) NEWLY LISTED SPECIES.—

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

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

1 “(C) JUDICIAL REVIEW.—Any action by
2 the Governor of a State under this subsection
3 shall not be subject to judicial review in any
4 court of the United States or in any State
5 court.”.

6 (b) COST ACCOUNTING.—The Endangered Species
7 Act of 1973 is amended by inserting after section 12 (16
8 U.S.C. 1541) the following:

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

10 “(a) DEFINITIONS.—In this section:

11 “(1) DIRECT COSTS.—The term ‘direct costs’
12 includes—

13 “(A) Federal agency obligations related to
14 the cost of any study;

15 “(B) capital, operation, maintenance, and
16 replacement costs; and

17 “(C) staffing costs.

18 “(2) INDIRECT COSTS.—The term ‘indirect
19 costs’ includes foregone power generation costs and
20 replacement power costs, including the net costs of
21 any transmission of power.

22 “(b) COST OF COMPLIANCE.—

23 “(1) IN GENERAL.—Except with respect to
24 intrastate endangered species or intrastate threat-
25 ened species regulated by a Governor of a State

1 under section 4(j), the Administrator of the Bonne-
2 ville Power Administration, the Administrator of the
3 Southeastern Power Administration, the Adminis-
4 trator of the Southwestern Power Administration,
5 and the Administrator of the Western Area Power
6 Administration shall each include in a monthly bill-
7 ing statement submitted to each customer of the re-
8 spective Administration the share of the direct and
9 indirect costs to the customer incurred by the Ad-
10 ministration related to complying with this Act.

11 “(2) ASSISTANCE IN IDENTIFYING COSTS.—The
12 Director of the Bureau of Reclamation shall assist
13 the administrators described in paragraph (1) with
14 identifying the costs described in that paragraph.

15 “(c) REPORT.—Not later than January 30 of each
16 year, each of the administrators described in subsection
17 (b)(1), in coordination with the Director of the Bureau
18 of Reclamation, shall submit to the Committee on Envi-
19 ronment and Public Works of the Senate and the Com-
20 mittee on Natural Resources of the House of Representa-
21 tives a report estimating the costs described in subsection
22 (b)(1)—

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

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

5 **“SEC. 12B. PROPERTY RIGHTS.**

6 “(a) DETERMINATION OF PROPOSED USE OF REAL
7 PROPERTY.—

8 “(1) IN GENERAL.—Any owner or lessee of any
9 real property may submit to the Secretary of the In-
10 terior an application that includes any proposed use
11 of the real property.

12 “(2) DETERMINATION.—

13 “(A) IN GENERAL.—Not later than 90
14 days after the date on which the application de-
15 scribed in paragraph (1) is submitted, the Sec-
16 retary of the Interior shall submit to the owner
17 or lessee in writing a determination as to
18 whether the proposed use will violate any provi-
19 sion of this Act.

20 “(B) FAILURE TO RESPOND.—If the Sec-
21 retary of the Interior fails to respond before the
22 expiration of the 90-day period described in
23 subparagraph (A), the proposed use shall be
24 considered to not violate any provision of this
25 Act.

1 “(3) EFFECT OF DETERMINATIONS.—

2 “(A) AFFIRMATIVE DEFENSE.—It is an af-
3 firmative defense to any civil penalty assessed
4 under section 11 or to any civil action, civil
5 suit, or prosecution brought under that section
6 that the owner or lessee of real property reason-
7 ably relied on a determination, including a de-
8 termination that resulted under paragraph
9 (2)(B), that a proposed use will not violate any
10 provision of this Act.

11 “(B) COMPENSATION FOR UNFAVORABLE
12 DETERMINATIONS.—If the Secretary of the In-
13 terior determines that a proposed use will vio-
14 late a provision of this Act, the owner or lessee
15 of the real property may seek compensation in
16 accordance with subsection (b).

17 “(b) COMPENSATION FOR AGENCY ACTIONS.—

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

19 “(A) AGENCY ACTION.—

20 “(i) IN GENERAL.—The term ‘agency
21 action’ means any action taken by the Di-
22 rector of the United States Fish and Wild-
23 life Service in accordance with this Act
24 that diminishes the fair market value of
25 any real property by not less than 50 per-

cent with respect to the intended use of the real property.

“(ii) EXCLUSION.—The term ‘agency action’ does not include any action taken with respect to intrastate endangered species or intrastate threatened species regulated by a Governor of a State under section 4(j).

“(B) LESSEE.—The term ‘lessee’ means a lessee of any real property affected by an agency action.

“(C) OWNER.—The term ‘owner’ means an owner of any real property affected by an agency action.

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

“(3) DETERMINATION OF FAIR MARKET VALUE.—

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

4 “(i) one shall be chosen by the Sec-
5 retary; and

6 “(ii) one shall be chosen by the owner
7 or lessee.

8 “(B) FAILURE TO AGREE ON FAIR MARKET
9 VALUE.—

10 “(i) IN GENERAL.—If the appraisers
11 chosen under subparagraph (A) fail to
12 agree on the same fair market value, the
13 Secretary and the owner shall jointly select
14 an additional licensed independent ap-
15 praiser to determine the fair market value.

16 “(ii) EXTENSION OF TIME TO MAKE
17 DETERMINATION.—The licensed inde-
18 pendent appraiser described in clause (i)
19 shall determine the fair market value not
20 later than 270 days after the date on
21 which the agency action takes place.

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

1 (c) PENALTIES AND ENFORCEMENT.—Section
2 11(g)(4) of the Endangered Species Act of 1973 (16
3 U.S.C. 1540(g)(4)) is amended by striking “attorney
4 and”.

5 (d) CONFORMING AMENDMENT.—Section 6(d)(1) of
6 the Endangered Species Act of 1973 (16 U.S.C.
7 1535(d)(1)) is amended by striking “the status of can-
8 didate species pursuant to subparagraph (C) of section
9 4(b)(3) and”.

○