MOVING TOWARD RECOVERY: A SOUTHEASTERN ANALYSIS OF THE THREATENED & ENDANGERED SPECIES RECOVERY ACT OF 2005 (H.R. 3824)

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I. INTRODUCTION

The Southeastern United States is home to a large number of species listed as endangered or threatened under the federal Endangered Species Act ("ESA" or "Act").[1] Alabama ranks third nationally with 114 listed species inhabiting the state, while Florida is only slightly behind with 111 listed species, followed by Tennessee

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[1] 16 U.S.C. §§ 1531-1544 (2005).

(100 listed species), Georgia (67 listed species), Mississippi (39 listed species), and Louisiana (27 listed species).[2] As a result, property owners in this region have become all too familiar with Section 4 of the Act, which governs listing decisions and requires the designation of critical habitat;[3] Section 7 of the ESA, which requires federal agencies to consult with the U.S. Fish and Wildlife Service ("Service" or "FWS") before approving activities that may affect listed species or their critical habitat;[4] and Section 9 of the ESA, which prohibits any person from engaging in any activity that might "take" any listed species.[5] For example, in Florida, the listings of various species of beach mice and the resulting development constraints have garnered significant attention,[6] as have the recoveries of the Florida panther and American alligator.[7] Likewise, in Alabama, the listing of the Alabama sturgeon has been the subject of a fifteen-year legal battle over the science used by the Service to determine whether the Alabama sturgeon is a separate and distinct species from the plentiful Mississippi shovelnose sturgeon.[8]

Therefore, it comes as no surprise that calls for reform of the ESA are often loudest among the Southern congressional delegations.[9] Many concerns over the ESA were raised at a Congressional field hearing held by the House Resources Committee in Jackson, Mississippi, on April 30, 2005, including the need for compensation

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[2] Hawaii has 317 listed species, the most of any state, followed by California with 304. *See* U.S. Fish & Wildlife Service, Listings by State & Territory, *available at* http://ecos.fws.gov/tess_public/TESSWebpageUsa Lists?state=all (last visited Nov. 2, 2005).

[3] *See* 16 U.S.C. § 1533 (2005).

[4] *See* 16 U.S.C. § 1536 (2005).

[5] *See* 16 U.S.C. § 1538 (2005).

[6] *See, e.g.,* Lynette Wilson, *Little Beach Mouse Causes Big Uproar on Perdido Key*, PENSACOLA NEWS JOURNAL, July 21, 2005, at 1A; AP, *Endangered Mice to Get Own Habitat*, MIAMI HERALD, July 29, 2004, at 3B (discussing that the designation of critical habitat for the St. Andrew beach mouse "could lead to certain land being put off-limits to human encroachment."); Jim Waymer, *Species Act Remains Source of Controversy*, FLORIDA TODAY, Dec. 28, 2003, at 1 (opining that "[d]evelopment threatens to wipe out the 4,000 pairs of Florida scrub jays that remain" and "could [also] claim a rare scrub mint plant that grows on only several acres in Titusville.").

[7] *See, e.g.,* Curtis Morgan, *Panther Back from Near Extinction*, MIAMI HERALD, Feb. 3, 2002, at 1A (explaining that, as a result of a controversial cross-breeding program, the once nearly-extinct Florida panther has expanded across much of wild Southwest Florida); Natalie Angier, *Not Just Another Pretty Face*, N.Y. TIMES, Oct. 26, 2004, at F1 (noting that, while most members of the Crocodylia order were not too long ago critically endangered, now "visitors to the Florida Everglades soon grow blasé at the sight of American alligators").

[8] *See, e.g.*, Val Walton, *Group Asks Judge to Lift Sturgeon's Protection*, THE BIRMINGHAM NEWS, Sept. 23, 2005 (discussing the current status of litigation challenging the listing of the Alabama sturgeon as endangered).

[9] Four of the thirteen original cosponsors were from Arkansas, Mississippi, and South Carolina. *See infra* note 26. The combined delegations of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia voted in favor of final passage of H.R. 3824 by a margin of 114 in favor to 37 opposed, or 75 percent in favor.

for takings of private property, reform of the listing process, and an increased focus on voluntary conservation measures, among other things.[10] Nonetheless, much of the momentum for reforming the ESA during the 109th Congress has emerged from the western congressional delegations, where large tracts of public and private lands are saddled with ESA-based restrictions.[11]

Whether the ESA is a glowing success or an abject failure depends on whom you ask. Some, tending toward the environmentalist side, stress the Act's role in preventing the extinction of such charismatic megafauna as the bald eagle, as well as less celebrated species.[12] On the other hand, advocates of reform have criticized the Act's failure to achieve recovery with respect to the vast majority of listed species,[13] even as it restricts otherwise legal and economically productive activity and depresses property values.[14] Further, critics and supporters alike have complained that the Service has failed to use the best scientific information, and that the agency's decisions have been subjected to improper political influence.[15]

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[10] *See Full Committee Field Hearing of the House of Representatives Committee on Resources: Oversight Field Hearing on Lessons Learned Protecting and Restoring Wildlife in the Southern United States under the Endangered Species Act*, *available at* http://resourcescommittee.house.gov/archives/109/full/043005.htm (last visited Nov. 3, 2005).

[11] *See* Michael Doyle, *West vs. East on Endangered Species Reform*, THE FRESNO BEE, June 23, 2005, at B4 ("Western lawmakers are stacking the deck as they push for changes in a perennially controversial environmental law.").

[12] *E.g.,* Robert Bonnie, *Building on Success: Improving the Endangered Species Act,* at 4 (May 2005), *available at* http://www.environmentaldefense.org/documents /4466_Building %20on%20Success.pdf (writing, on behalf of Environmental Defense, "The bald eagle is an ESA success story"). On the other hand, it is widely noted, even among opponents of H.R. 3824, that the ban of the pesticide DDT had at least as much to do with increasing the numbers of this bird as any program or restriction under the ESA. *See, e.g.,* 151 CONG. REC. H8537 (daily ed. Sept. 29, 2005) (statement of Rep. Grijalva) ("The ban on DDT, which the EPA said posed unacceptable risks to the environment and human health, saved the bald eagle."); Bonnie at 1 ("Thanks to the 1973 banning of DDT . . . and the protection provided by the ESA, bald eagles have returned to America's skies."). The ban on DDT was a completely separate action that had nothing to do with the ESA. U.S. Envtl. Prot. Agency, *DDT Regulatory History: A Brief Survey (to 1975)* (July 1975), *available at* http://www. epa.gov/history/topics/ddt/02.htm.

[13] Richard W. Pombo, Report to the House Committee on Resources, *Implementation of the Endangered Species Act of 1973*, at 1-2 (May 2005).

[14] *E.g.,* Nat'l Ass'n of Home Builders, *Species and Habitat Protection*, *available at* http://www.nahb.org/generic.aspx?sectionID=215&genericContentID=3464 (last visited Nov. 8, 2005) ("The ESA requirements continue to result in severe economic impacts and hardships to private property owners and communities nationwide."); U.S. Chamber of Commerce, *Endangered Species Act*, *available at* http://www.uschamber.com/issues/index/ regulatory/endangered.htm (last visited Nov. 8, 2005) (making the same claim).

[15] *Junk Science is the Law of the Land: Routine Censorship of Scientists is Endangering the Nation's Wildlife,* FRONTLINE NEWSLETTER (Apr. 7, 2005), *available at* http://www. nahb.org/generic.aspx?sectionID=215&genericContentID= 3464 (last visited Nov. 8, 2005); Earthjustice, *Science and the Law: Protections for Endangered Species Depend on Both*, *available at* http://www.earthjustice.org/policy/pdf/science_and_the_law_ 3_30_05.pdf (last visited Nov. 8, 2005) (expressing concern for manipulation of scientific information for

It is against this backdrop that the first attempt at meaningful reform of the ESA since 1997 occurred this year. On September 29, 2005, the U.S. House of Representatives voted in favor of H.R. 3824, the Threatened and Endangered Species Recovery Act of 2005 ("TESRA" or "H.R. 3824").[16] This legislation, if enacted, would be the first amendment to the ESA since 2003[17] and the first reauthorization and set of extensive amendments since 1988.[18]

Part II of this article memorializes the process leading to House passage of H.R. 3824. Part III describes and briefly analyzes the particularly important revisions proposed by H.R. 3824, and Part IV discusses the prospects for Senate consideration and ultimate enactment of legislation to amend and reauthorize the ESA. Finally, Part V concludes with an analysis of the strengths and weaknesses of H.R. 3824, and suggests issues of concern and possible courses of action as the legislative process continues in the Senate.

II. CONSIDERATION AND APPROVAL OF H.R.3824

This latest attempt to reform the ESA began in early 2005, and H.R. 3824 moved rapidly through the House of Representatives upon introduction. In an eleven-day period in September, the bill was introduced, marked up and amended by the Resources Committee, and approved by the full House. This portion of the article describes the process leading to House passage of the bill.

A. Activity Leading to Introduction of Legislation

Beginning in March and for several months thereafter, Rep. Richard Pombo (R-CA), Chairman of the House Resources Committee, and his staff prepared draft legislation, which initiated this

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political purposes); M. Reed Hopper, *Endangered Species Act Reform Project*, *available at* http://www. pacificlegal.org/view_SpecialProjects.asp?iID=18&sTitle=%3Cb%3E Endangered+Species+Act+Reform+Project%3C%2Fb%3E (last visited Nov. 8, 2005) (noting, on behalf of a conservative advocacy organization, that "environmental policy is often based on politically motivated pressure from environmental activists and federal agencies trying to justify their budgets").

[16] A line-by-line analysis of the changes to the ESA proposed by H.R. 3824 is available online. *See* Bill Satterfield et al., *H.R. 3824: The Threatened & Endangered Species Recovery Act of 2005 – Changes in Existing Law*, *available at* http://www.balch.com/ resources/details.cfm?ID=279 (last visited Nov. 3, 2005).

[17] Pub. L. No. 108-136, § 318, 117 Stat. 1392, 1433 (2003).

[18] Pub. L. No. 100-478, 102 Stat. 2306 (1988). A reform effort in the United States Senate in 1997 led to the introduction of S. 1180, the so-called Kempthorne-Chafee bill, which was voted out of committee, but the full Senate took no further action on the bill. *See* Ike Sugg, *Endangered Species Reform Dangers*, THE WASHINGTON TIMES, Nov. 10, 1997, at A14.

most recent effort to reauthorize and amend the ESA.[19] As part of that effort, the Committee conducted a general hearing regarding ESA implementation in Jackson, Mississippi, on April 30, 2005, and another hearing more narrowly focused on a petition to list the Eastern oyster on July 19, 2005.[20] The Committee has held scores of hearings – according to Chairman Pombo, more than fifty – since authorization for the Act expired in 1992.[21]

The first draft of House ESA reform legislation was a seventy-three page "staff discussion draft" of TESRA, dated June 17, 2005. Among the provisions of the discussion draft was a proposed repeal of critical habitat requirements, which was the first indication of the sweeping reform that TESRA signaled.[22] Meanwhile, Chairman Pombo and his staff negotiated with Rep. Nick Rahall (D-WV), ranking minority member of the Committee, in an effort to reach a bipartisan consensus.[23] While Mr. Rahall ultimately did not support TESRA, the Democratic staff contributed significantly to the text of the bill prior to its introduction.[24]

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[19] Chairman Pombo has worked actively on the ESA since his first term in Congress, which began in 1993. For example, he introduced his first bill proposing amendment of the ESA on March 8, 1994. *See* H.R. 3978, 103d Cong. (1994).

[20] *Potential Listing of the Eastern Oyster Under the Endangered Species Act: Hearing Before the House Comm. on Resources*, *109th Cong.*, *available at* http://resources committee.house.gov/archives/109/full/index.htm (last visited Nov. 10, 2005). Mr. Don Waldon, Administrator of the Tennessee-Tombigbee Waterway Development Authority, testified at the field hearing in Mississippi. Among those submitting written testimony were Dan Warren of Southern Company and Dr. Mike Howell, Professor of Biology from Samford University in Birmingham. Others testifying included state wildlife officials, an employee of the Army Corps of Engineers, the executive director of a prominent environmental group, and various industry representatives.

[21] 151 CONG. REC. H8524 (daily ed. Sept. 29, 2005) (statement of Rep. Pombo).

[22] TESRA's repeal of critical habitat provisions would also remove the requirement for the Service, absent extraordinary circumstances, to analyze the economic and national security impacts concurrently with the listing decision. *See* 16 U.S.C. § 1533(a)(3) & (b)(2) (2005) (requiring critical habitat designation occur concurrently with a listing decision unless such habitat is not determinable or it is not prudent to do so, and requiring consideration of "the economic impact, the impact on national security, and any other relevant impact" of designating critical habitat). On July 12, 2005, the seven member Alabama House delegation signed a letter to Chairman Pombo expressing concern about the removal of the impact analysis requirement. Letter from Rep. Terry Everett et al. to the Honorable Richard Pombo (July 12, 2005). As discussed *infra*, H.R. 3824 (as passed by the House) includes a provision requiring the Service to analyze the economic and national security impacts of a listing decision.

[23] *See* 151 CONG. REC. H8535-36 (daily ed. Sept. 29, 2005) (statement of Rep. Rahall) (describing the process of negotiations as consuming "several months").

[24] One proponent of the bill stated that about 90 percent of the bill was drafted by Democratic staff. 151 CONG. REC. H8523 (daily ed. Sept. 29, 2005) (statement of Rep. Cardoza). Mr. Rahall characterized the "90 percent" figure as unfair, and he cited particular items in the manager's amendment that he opposed, but did not dispute the fact of significant Democratic contributions to the text of the bill. *Id.* at H8561-62 (statement of Rep. Rahall).

On Monday, September 19, 2005, Chairman Pombo's office made available a final draft of the proposed legislation. The draft was dated September 17 and measured seventy-four pages. Later that day, Chairman Pombo and thirteen cosponsors introduced the draft legislation as H.R. 3824,[25] beginning an intensive, eleven-day effort to introduce, markup, and secure House passage of TESRA.[26]

B. Committee Consideration

The House Resources Committee held a "legislative hearing" on H.R. 3824 on Wednesday, September 21, 2005. The Bush Administration did not provide a formal position on the bill at that time, citing the short time since introduction.[27] On Thursday, September 22, the Committee held a markup and considered numerous amendments.[28] During the markup, Rep. John Peterson (R-PA) offered an amendment on behalf of the Alabama delegation that would have required an impact analysis at the time of listing.[29] Based on an assurance from Chairman Pombo, supported by Mr. Rahall, that they would support inclusion of a similar measure in the manager's amendment, Rep. Peterson withdrew the so-called "Alabama amendment." The Committee subsequently voted to report H.R. 3824 to the full House of Representatives by a vote of twenty-six yeas to twelve nays.[30] The Committee Report was filed, and the bill was reported to the full House on Tuesday evening, September 27.[31] By

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[25] Cosponsors upon introduction of H.R. 3824 were Reps. Cardoza (D-CA), Walden (R-OR), Berry (D-AR), Radanovich (R-CA), Ross (D-AR), Cubin (R-WY), McMorris (R-WA), Thompson (D-MS), Brown (R-SC), Baca (D-CA), Graves (R-MO), Costa (D-CA), and Gibbons (R-NV).

[26] Between September 19, 2005, and September 29, 2005, members of the House were presented with five versions of this proposed bill, in addition to the manager's amendment and a lengthy substitute amendment: (1) the September 17 draft; (2) H.R. 3824 as introduced (Sept. 19, 2005); (3) a "committee print" of the bill as marked up (Sept. 26, 2005), which was necessary to interpret the manager's amendment; (4) H.R. 3824 as reported (Sept. 27, 2005); and (5) H.R. 3824 as enrolled in the House after final passage (Sept. 29, 2005). Still another version of the bill was printed on September 30, 2005, for purposes of transmittal to the Senate, where it was referred to the Committee on Environment and Public Works. 151 CONG. REC. S10796 (daily ed. Sept. 30, 2005).

The dates and times of official actions relating to H.R. 3824 (that is, all actions other than circulations of drafts and unofficial committee prints) are available on Thomas, the Congressional web site, at http://thomas.loc.gov/cgi-bin/bdquery/z? d109:HR03824:@@@X (last visited Oct. 11, 2005).

[27] Testimony of the Honorable Craig Manson, Assistant Secretary of the Interior for Fish and Wildlife and Parks, before the House Committee on Resources (Sept. 21, 2005), *available at* http://resourcescommittee.house.gov/archives/109/testimony/2005/craigmanson.htm.

[28] *See* H.R. REP. NO. 109-237, at 25-32 (2005).

[29] H.R. REP. NO. 109-237, at 25-26 (2005).

[30] H.R. REP. NO. 109-237, at 33-34 (2005).

[31] H.R. REP. NO. 109-237 (2005).

that time, ninety-five Members of Congress, including the entire Alabama House delegation, had cosponsored the bill.

On the evening of Wednesday, September 28, the Rules Committee reported a rule providing for consideration of H.R. 3824, under which two amendments would be in order: a "manager's amendment" to be offered by Chairman Pombo, and a "substitute amendment" (meaning that its text would completely replace that of the underlying bill) offered by Reps. George Miller (D-CA), Boehlert (R-CA), Dingell (D-MI), Gilchrest (R-MD), Dicks (D-WA), Saxton (R-NJ), Tauscher (D-CA), and Kirk (R-IL).[32] The manager's amendment included, among other items, a provision requiring an impact analysis at the time of listing in response to the concerns expressed by the Alabama delegation.[33] The Miller substitute amendment did not include the impact analysis requirement.

C. Floor Consideration and Passage

Consideration of H.R. 3824 began on the floor of the House of Representatives in the late morning of September 29.[34] On that day, the Administration released a statement supporting passage of the bill, while also expressing reservations about certain provisions.[35] The House first considered the rule governing consideration of H.R. 3824. After roughly an hour of debate, the rule passed by a roll call vote of 252 yeas and 171 nays.[36] At approximately 1:00 P.M., the House began consideration of H.R. 3824 and engaged in several hours of debate.[37] Soon after 4:30 P.M., the House voted by a margin of 206 yeas and 216 nays to reject the substitute amendment.[38] Shortly thereafter, the House agreed to the manager's amendment by voice vote. After additional debate, the House voted to approve H.R. 3824 with 229 votes in favor (including 36 Democrats) and 193 against

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[32] H.R. Res. 470, 109th Cong. (2005); H.R. REP. NO. 109-240, at 2 (2005).

[33] H.R. REP. NO. 109-240, at 3 (2005).

[34] 151 CONG. REC. H8518 (daily ed. Sept. 29, 2005) (noting a time of 10:30 shortly after the beginning of consideration of H.R. Res. 470).

[35] Office of Management and Budget, Statement of Administration Policy: H.R. 3824 – Threatened and Endangered Species Recovery Act of 2005 (Sept. 29, 2005). This document expressed concerns about the budgetary impact and lack of administrative discretion with respect to recovery agreements, various deadlines, and the conservation aid program for private property owners. The document also expressed the view that the proposed "jeopardy" definition in the bill would lead to litigation and "further divert agency resources from conservation purposes."

[36] 151 CONG. REC. H8528-29 (daily ed. Sept. 29, 2005).

[37] 151 CONG. REC. H8535-82 (daily ed. Sept. 29, 2005).

[38] 151 CONG. REC. H8582-83 (daily ed. Sept. 29, 2005) (roll call vote no. 505).

(including 34 Republicans).[39] Members were allowed to revise and extend their remarks, and a number of members placed speeches in the "extension of remarks" section of the *Congressional Record* on October 3, 6, and 7, 2005.[40]

III. AN ANALYSIS OF MAJOR REVISIONS IN H.R. 3824

H.R. 3824 makes substantial changes to the Endangered Species Act. This portion of the article attempts to identify the major revisions in this legislation, focusing on those issues that have generally been identified as issues of importance in the Southeast.

A. Moving Toward Recovery

A central justification for reforming the ESA is its apparent failure to result in the recovery of threatened or endangered species. As one commentator has explained: "Listing is not supposed to be forever. The goal of the ESA is to help a species recover so that it is no longer in danger of extinction and no longer in need of the law's protections."[41] While over 1,200 species are currently listed as threatened or endangered species, only ten domestic species have been delisted due to recovery.[42] Section 4(f) of the ESA requires the Service to develop recovery plans for each listed species that include "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list."[43] These recovery plans, however, are seldom developed until many years after the final listing of the species.[44] In fact, the ESA does not require the Service to establish recovery objectives at the time a listing decision is made.

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[39] 151 CONG. REC. H8583-84 (daily ed. Sept. 29, 2005) (roll call vote no. 506). All seven members of the Alabama delegation voted in favor of the rule providing for consideration of H.R. 3824, against the substitute amendment, and in favor of final passage of H.R. 3824. *See supra* note 9.

[40] 151 CONG. REC. E2003-04 (daily ed. Oct. 3, 2005), E2015-17, 2020-21, 2028, 2042 (daily ed. Oct. 6, 2005), E2048, E2052-53, E2055, E2056, E2057-58, E2066, E2071-72, E2076 (daily ed. Oct. 7, 2005).

[41] JOHN C. NAGLE & J.B. RUHL, THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT 153 (2002).

[42] *See* Richard W. Pombo, Report to the House Committee on Resources, *Implementation of the Endangered Species Act of 1973*, at 2 (May 2005).

[43] 16 U.S.C. § 1533(f) (2005).

[44] *See* Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 ENVTL. L. 483, 502 (2004) (explaining that in light of the "ESA's ultimate goal of actually improving the status of listed species rather than merely retarding or halting their slide toward extinction," Congress is likely to revisit the recovery plan provisions of the ESA in order to improve the likelihood of species recovery).

TESRA attempts to improve the recovery percentages for listed species by focusing resources on recovery planning. Specifically, TESRA requires development of a recovery plan within two years of the listing of a threatened or endangered species unless FWS finds that a recovery plan would not "promote the conservation and survival of the species."[45] FWS must develop regulations providing for the appointment of recovery teams, which are to comprise "sufficient representation from constituencies with a demonstrated direct interest in the species and its conservation or in the economic and social impacts of its conservation to ensure that the views of such constituencies will be considered in the development of the plan."[46] The intent is that "those most directly affected by the plans have a voice in their preparation."[47] Such participants may "supply new insights, particularly concerning land and water management constraints and opportunities . . . [which] will be particularly valuable in devising the recommended measures."[48] The regulations also are to explain the circumstances when FWS would not be required to appoint a recovery team, as well as public comment procedures on a decision not to appoint a recovery team.[49] The recovery plan itself must include:

- "[o]bjective, measurable criteria that, when met, would result in a determination . . . that the species . . . be" delisted or downlisted,[50] which must be developed by recovery team members with "relevant scientific expertise" and based on the best available scientific data;[51]
- "site-specific or other measures" to achieve these criteria, as well as "[e]stimates of the time required and the costs, including direct, indirect, and cumulative costs, to carry out" these measures;[52]
- "alternative measures" whenever possible, and an identification "among such alternative measures of comparable expected efficacy, the alternatives that are least costly;"[53] and

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[45] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(a)).

[46] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(d)(2)(A)(ii)). TESRA does not include a deadline for promulgation of these regulations.

[47] H.R. REP. NO. 109-237, at 41 (2003).

[48] H.R. REP. NO. 109-237, at 41 (2003).

[49] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(d)(2)(D)).

[50] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)(1)(A)).

[51] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)(1)(B)).

[52] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)(1)(A)).

[53] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)(1)(D)(ii)).

- "[a]n identification of those specific areas that are of special value to the conservation of the species."[54]

As noted above, H.R. 3824 repeals the ESA's present critical habitat provisions. TESRA's new identification of "areas of special value" in the recovery planning process is the nearest approximation to critical habitat under H.R. 3824. However, the designation of such areas carries no regulatory significance comparable to the requirement of current law to consider the effects of a proposed federal action on critical habitat during consultation under ESA Section 7. According to the House Resources Committee report, such areas "are not to be identified for the regulatory purposes that accompanied critical habitat. Rather their identification should inform, but not dictate, other decisions under the ESA."[55]

The Committee Report emphasizes that recovery plans remain, as under current law, guidance documents lacking in direct regulatory force and authority.[56] According to the report, "recovery plans are intended to inform, but not dictate, relevant decision making under the ESA."[57] However, "they can have binding effect if a federal agency decides to adopt all or part of any specific plans . . . or if the nonfederal entities or landowners voluntarily choose to adopt such provisions in cooperative agreements, habitat conservation plans, safe harbor agreements, etc."[58]

TESRA authorizes "species recovery agreements" of terms of not less than five years, which are available for those who own or control land,[59] and "species conservation contract agreements" of terms of ten, twenty, or thirty years for land owners only.[60] Such agreements may include "annual payments or . . . other compensation" to a party to such an agreement, subject to the availability of appropriations.[61]

B. Compensation for Private Land Owners

Plaintiffs across the country have filed suit asking federal and state courts to grant them compensation for the loss of property rights

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[54] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)(1)(A)).
[55] H.R. REP. NO. 109-237, at 40 (2005).
[56] H.R. REP. NO. 109-237, at 41-42 (2005).
[57] H.R. REP. NO. 109-237, at 41 (2005).
[58] H.R. REP. NO. 109-237, at 42 (2005).
[59] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 5(m)(2)(A)).
[60] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 5(m)(3)(A)).
[61] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 5(m)(3)).

or revenue due to regulatory restrictions imposed under the ESA.[62] The "threat of regulatory deprivation of development rights looms on the horizon anytime an endangered or threatened species is identified on private property."[63] Nonetheless, courts have thus far been hesitant to grant compensation for regulatory takings that occur as a result of the ESA.[64] This has prompted a growing chorus of cries from the property rights movement for a statutory mechanism to compensate land owners when ESA-based constraints are imposed on private property.

TESRA adds a new section entitled "Private Property Conservation" to the ESA.[65] This new Section 13 requires (among other things) FWS to provide "financial conservation aid" to "alleviate the burden of conservation measures imposed upon private property owners."[66] The process begins with the land owner filing a written request for a determination, pursuant to a new ESA Section 10(k), that a proposed activity does not violate the "take" prohibition of ESA Section 9(a).[67] Upon receiving a determination from FWS that the proposal would violate Section 9(a), the land owner must forego the proposed use, submit a request for aid (i.e., compensation) to FWS within 180 days, and demonstrate that "the foregone use would be lawful under State and local law and . . . that the property owner has the means to undertake the proposed use."[68]

The amount of the financial aid is to equal "no less than the fair market value of the use that was proposed by the property owner."[69] "Fair market value" is defined as an amount equal to the "fair market

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[62] For example, in *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), a South Florida land developer was prevented from developing his property because two different species of endangered rats lived on his property. More recently, in *Seiber v. United States*, No. 03-5010, 2004 WL 830172 (Fed. Cir. Apr. 19, 2004), state and federal regulators prohibited Oregon timber harvesters from logging a large parcel of property due to the presence of nesting habitat for the threatened northern spotted owl. Neither decision resulted in compensation to the private land owner.

[63] *See* Robert P. Fowler & Jeffrey H. Wood, *The Temporary Taking and Relevant Parcel Aspects of Regulatory Takings Claims under the Endangered Species Act*, ABA Public Lands & Resources Committee Newsletter (Aug. 2004), *available at* http://www.abanet.org/environ /committees/publiclands/newsletter/aug04/ publicland0804.pdf.

[64] *See* Seiber v. United States, No. 03-5010, 2004 WL 830172, at *9-12 (Fed. Cir. Apr. 19, 2004) (rejecting a constitutional takings claim because, among other things, the plaintiffs "did not lose all value in their parcel as a whole"). *See also* Library of Congress Congressional Research Office, *The Endangered Species Act and Claims of Property Rights "Takings": A Summary of the Court Decisions* (Mar. 10, 2003) (compiling "the court decisions in cases challenging ESA-based measures as a 'taking' of private property under the Fifth Amendment").

[65] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13).

[66] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(a)).

[67] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(d)(1)).

[68] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(d)(2)).

[69] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(d)(2)).

value of the foregone use of the affected portion of the private property," based on "what a willing buyer would pay to a willing seller in an open market."[70] The amount is to be determined by a pair of appraisers – one chosen by each party – or, if the two cannot agree, a third appraiser chosen mutually.[71] The government must make payment within 270 days, "unless there are unresolved questions regarding the fair market value" at that time.[72] Aid is to be provided pursuant to direct spending, meaning that it would *not* be subject to the annual appropriations process.[73]

Separately, H.R. 3824 also includes a new ESA Section 17 that would provide compensation for the loss of livestock caused by listed predators that have been reintroduced.[74] Unlike the compensation provisions described above, this mechanism is subject to the availability of annual appropriations.[75]

C. Best Science Standard

Commentators have raised concerns about whether FWS is consistently employing the "best scientific and commercial data available" when listing species or making other decisions under the ESA.[76] TESRA introduces the term "best available scientific data,"

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[70] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(g)).

[71] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(g)).

[72] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(e)(1)).

[73] *See* H.R. Rep. No. 109-237, at 61 (2005) (reprinting the cost estimate provided by the Congressional Budget Office ("CBO")). CBO estimates the compensation section would cost less than $10 million over the first five years of implementation, due in part to the fact that it will take a couple of years to develop the program. *Id.* at 59. Even after the program matures, CBO estimates that costs will likely average "less than $20 million a year." *Id.* at 61. CBO took the position that "it would be difficult for landowners to receive aid for larger claims above $1 million . . . because most larger land-use projects would be ineligible to receive written determinations [of take liability]," *id.*, which is a prerequisite to seeking compensation. The CBO document found that "most aid payments eventually made by the government would be relatively small (often as little as a few thousand dollars) because the vast majority of aid requests would likely involve small parcels of land or some minor fraction ('affected portion') of larger tracts." *Id.* This estimate is in stark contrast to H.R. 3824 opponents' claims that costs associated with speculative claims could approach "billions of dollars" in new costs to the government. 151 CONG. REC. 2020, 2021 (daily ed. Oct. 6, 2005) (statement of Rep. Eshoo). Notably, criticism regarding speculative claims does not account for the requirement to demonstrate the lawfulness of the foregone use and the property owner's demonstration of the means to undertake that use. *Id.*

[74] H.R. 3824, 109th Cong. § 16 (Sept. 29, 2005) (proposed ESA § 17).

[75] H.R. 3824, 109th Cong. § 16 (Sept. 29, 2005) (proposed ESA § 17(d)).

[76] *See* Francesca Ortiz, *Candidate Conservation Agreements as a Devolutionary Response to Extinction*, 33 GA. L. REV. 413, 442 (stating: "The best science may raise questions as to its objectivity and reliability. Who collected the data? Who interpreted it? Was there any underlying agenda other than pure science? What assumptions have been made? Have study results been corroborated? Are there conflicting conclusions? The list of questions can go on, but the point is that numerous factors impact all scientific studies; data collected may be incomplete or inaccurate, and, even if accurate, different people can interpret the data in

which is defined as "scientific data, regardless of source, that are available to the Secretary at the time of a decision or action for which such data are required by this Act and that the Secretary determines are the most accurate, reliable, and relevant for use in that decision or action."[77] TESRA requires the Secretary to adopt regulations establishing criteria for this standard within one year of enactment, and these regulations must assure compliance with the Information Quality Act and assure that data "consists [sic] of empirical data" and "is [sic] found in sources that have been subject to peer review by qualified individuals recommended by the National Academy of Sciences to serve as independent reviewers for a covered action in a generally acceptable manner."[78]

TESRA does not include a provision specifically mandating the use of genetic information or analysis. However, in a statement that appeared in the *Congressional Record* on October 6, 2005, Chairman Pombo stated that "the Committee expects that [FWS] will take advantage of developments that have occurred in genetics testing and other technical advances in the years since enactment of the original Endangered Species Act, to make the most scientifically sound listing decisions possible."[79]

D. Open & Sound Decision-Making Process

Listing decisions are based on factors that have a direct bearing on the status of the species in the wild – for example, changes to the species' habitat, overutilization of the species, or the adequacy of existing conservation programs.[80] Thus, the quality of the scientific information used by FWS to evaluate these factors and to make other ESA-related decisions is critical. However, businesses and environmental groups alike have alleged in various instances that the scientific information on which listing decisions are based is subject to political influence, and that FWS has failed to consider important information that was available to it.[81]

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different ways. Furthermore, information that is considered accurate today may prove inaccurate as new information comes to light."). Not everyone is convinced that comprehensive changes to the best science standard are necessary. *See* GAO, *Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designations*, at 9-26 (Aug. 2003). Others have asked whether scientific data alone should determine whether a species should be listed. *See* Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1036 (1997).

[77] H.R. 3824, 109th Cong. § 3(a) (Sept. 29, 2005) (proposed ESA § 3(2)(A)).

[78] H.R. 3824, 109th Cong. § 3(a) (Sept. 29, 2005) (proposed ESA § 3(2)(B)&(C)).

[79] 151 CONG. REC. 2028 (daily ed. Oct. 6, 2005) (statement of Rep. Pombo).

[80] ESA § 4(a)(1). 16 U.S.C. § 1533(a)(1).

[81] *See supra* note 16.

TESRA provides a new definition of "best available scientific data" which requires FWS to issue regulations, which "assure" that data are "found in sources that have been subject to peer review by qualified individuals recommended by the National Academy of Sciences to serve as independent reviewers for a covered action in a generally acceptable manner."[82] FWS must use the "best available scientific data" for listing decisions,[83] as well as for preparing recovery plans[84] and biological opinions.[85]

Further, TESRA includes several measures intended to provide greater public access to information used by FWS in listing determinations. Under TESRA, listing petitions (which "any person" may submit to FWS to request a new listing determination) must include "a copy of all information cited in the petition."[86] FWS must maintain a public website containing a "complete record" of all information concerning listing determinations or revisions.[87] In addition, TESRA includes a new ESA Section 14 which requires FWS to maintain a public website with final and proposed listings; five-year species status reviews; draft and final recovery plans; biennial reports to Congress on the status of species; annual reports to Congress on conservation costs; and data included in the reports to Congress on the status of species and conservation costs.[88] However, at least one provision in TESRA seems to run counter to the concept of greater openness in the listing process; namely, TESRA's recovery planning provisions exempt activities of recovery planning teams from the Federal Advisory Committee Act.[89]

E. Impact of State Programs on Listing Decisions

Some have recommended that the ESA give greater weight to state-sponsored conservation programs as an alternative to federal regulation.[90] TESRA adds a provision expressly including state

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[82] H.R. 3824, 109th Cong. § 3(a) (Sept. 29, 2005) (proposed ESA § 3(a)(2)(A), (C)).
[83] H.R. 3824, 109th Cong. § 4(b) (Sept. 29, 2005) (proposed ESA § 4(b)(1)(A)).
[84] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(c)).
[85] H.R. 3824, 109th Cong. § 11(a)(2)(C) (Sept. 29, 2005) (proposed ESA § 7(a)(2)).
[86] H.R. 3824, 109th Cong. § 4(a) (Sept. 29, 2005) (proposed ESA § 4(b)(2)(A)).
[87] H.R. 3824, 109th Cong. § 6(b)(1)(A)(v) (Sept. 29, 2005) (proposed ESA § 4(b)(4)(A)(iii)).
[88] H.R. 3824, 109th Cong. § 14 (Sept. 29, 2005) (proposed ESA § 14).
[89] H.R. 3824, 109th Cong. § 9(a)(3) (Sept. 29, 2005) (proposed ESA § 5(d)(3)).
[90] *See, e.g.*, U.S. House of Representatives Committee on Resources, Testimony of Donald Waldon, Administrator of the Alabama-Tombigbee Waterway Development Authority, at 9-11 (Apr. 30, 2005), *available at* http://resourcescommittee.house.gov/archives/109/testimony/2005/donaldwaldon.pdf (last visited Nov. 3, 2005) (arguing that "the Service should begin giving greater weight to state-sponsored conservation plans as a means of providing the species with the greatest chance of recovery without triggering the ESA's costly constraints").

conservation efforts (and those of other federal agencies and nations) among the "regulatory mechanisms" which FWS must consider in making a listing determination.[91] In addition, TESRA authorizes FWS to enter into conservation agreements for candidate species and other non-listed species.[92] Once a state program is in effect pursuant to such a conservation agreement, any incidental take permit issued for the State plan remains in effect for the State and any private land owners enrolled in the program if the species is later listed.[93] FWS may suspend the conservation agreement authorizing the State program only after consultation with the Governor, upon finding that it "no longer constitutes an adequate and active program for the conservation of [listed] species."[94] FWS may terminate any such agreement after consulting with the Governor if, upon concluding a Section 7 consultation, FWS finds that it would likely jeopardize the continued existence of the species, or if the program is suspended and not revised to address its deficiencies within 180 days.[95]

F. Incentives for Voluntary Conservation Efforts

A growing consensus across political and ideological boundaries has emerged in favor of creating more incentives for private land owners to participate in the conservation of threatened and endangered species.[96] This is even more critical in the South, where there is relatively little federal land (and, therefore, relatively little habitat for listed species on federal land) compared to the West. Yet the ESA offers surprisingly little reason for a private land owner to implement conservation measures. If anything, the Act discourages such activity by imposing strict federal regulation on the owner of land that happens to serve as habitat for listed species.

In response, TESRA takes a number of steps to make habitat conservation plans ("HCPs") more manageable and, therefore, more attractive for the land owner. The bill codifies "no surprises" and permit revocation measures similar to those found in regulations that

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[91] H.R. 3824, 109th Cong. § 4(a) (Sept. 29, 2005) (proposed ESA § 4(a)(1)(D)).

[92] H.R. 3824, 109th Cong. § 10(1) (Sept. 29, 2005) (proposed ESA § 6(c)(3)).

[93] H.R. 3824, 109th Cong. § 10(1) (Sept. 29, 2005) (proposed ESA § 6(c)(3)).

[94] H.R. 3824, 109th Cong. § 10(3)(C) (Sept. 29, 2005) (proposed ESA § 6(e)(3)).

[95] H.R. 3824, 109th Cong. § 10(3)(C) (Sept. 29, 2005) (proposed ESA § 6(e)(4)).

[96] *See, e.g.,* American Farm Bureau Federation, *Better Endangered Species Incentives Needed* (Sept. 15, 2005), *available at* http://www.fb.org/news/nr/nr2005 /nr0915.html (last visited Nov. 8, 2005); Environmental Defense, *Farm, Timber, Environmental, Scientific, and Other Interests Praise Endangered Species "Safe Harbor" Agreements* (Jan. 15, 2002), *available at* http://www.environmentaldefense. org/article.cfm?contentid=711 (last visited Nov. 8, 2005) (noting support from a wide variety of interest groups for safe harbor agreements).

have been promulgated by FWS.[97] New ESA Section 10(a)(4) provides that FWS may not require any permit holder who is in compliance with an HCP to "adopt any new minimization, mitigation, or other measure with respect to any species adequately covered by the permit," except as provided in the permit itself.[98] FWS may require additional measures to respond to "changed circumstances not identified in the permit" only if such measures "do not involve the commitment of any additional land, water, or financial compensation" beyond that accounted for in the permit itself.[99] Under TESRA, FWS may revoke a permit due to changed circumstances only if: (1) the permitted activities are inconsistent with the goals for the species that are to be included in the HCP itself; (2) the Secretary provides sixty days notice; and (3) "the Secretary is unable to, and the permittee chooses not to, remedy the condition causing such inconsistency."[100]

TESRA also requires that measures in an HCP to "reduce or offset the impacts of incidental taking" be "roughly proportional in extent to the impact of the incidental taking."[101] This provision, however, expressly allows "greater than acre-for-acre mitigation where necessary to address the extent" of the impacts of the take.[102] Such measures must be "capable of successful implementation and . . . consistent with the objective of the applicant to the greatest extent possible."[103] Committee Report language explains that the "rough proportionality" language is intended to codify a principle in the case of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), namely, "that government can only demand conditions on land use activity that are tailored to address the particular impacts that will accrue from the

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[97] 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5) (2004) (no surprises); 69 Fed. Reg. 71,723, 71,731 (Dec. 10, 2004) (promulgating permit revocation provisions to be codified at 50 C.F.R. §§ 17.22(b)(8), 17.32(b)(8)). Both sets of regulations have already been the subject of litigation, but this litigation has, thus far, addressed only procedural issues and not the content of the regulations. Spirit of the Sage Council v. Norton, 411 F.3d 225, 227-29 (D.C. Cir. 2005) (describing the history of the litigation). Various environmental groups remain opposed to the regulations. *E.g.*, Center for Biological Diversity, An Analysis of H.R. 3824, at 4 (undated), *available at* http://www.biologicaldiversity.org/swcbd/Programs/policy/esa/CBD-ANALYSIS.pdf (last visited Nov. 11, 2005) ("The Pombo bill codifies the 'No Surprises' policy--currently a highly controversial administrative regulation that has been widely condemned by scientists"). Therefore, further litigation challenging these regulations remains likely.

[98] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(4)).

[99] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(4)(C)).

[100] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(5)(B)).

[101] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(3)). The same "proportionality" requirement applies with respect to "reasonable and prudent measures" included in an incidental take statement issued in the course of a Section 7 consultation.

[102] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(3)).

[103] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(3)).

project under review."[104] Further, FWS cannot rely on conclusory statements regarding hypothetical impacts of a project as justification to impose excessive conditions on private land use activities to address the incidental take of species. In short, the government must develop a sufficient administrative record to justify "terms and conditions" under this standard.[105]

TESRA does not specifically authorize candidate conservation agreements or safe harbor agreements, although FWS regulations implementing both of these types of agreements remain in effect.[106] In addition, the Resources Committee report acknowledges these regulations,[107] which arguably constitutes tacit Congressional approval of these regulatory innovations. Further, as noted above, the bill allows FWS to approve State programs covering non-listed species.[108] The incidental take statement for such programs continues to apply to the State and private land owners enrolled in the State program if a covered species is listed.[109]

In addition, TESRA includes measures that may provide alternative means to pursue actions that, under current law, often require incidental take permits. The bill authorizes FWS to enter into "species recovery agreements" (minimum term of five years) and "species conservation contract agreements" (ten, twenty, or thirty year terms) with private landowners who agree to "protect and restore habitat for covered species."[110] Funding to implement these conservation measures is authorized (subject to the availability of appropriations) to varying extents under these agreement mechanisms.[111] Such an agreement is deemed to be a permit under ESA Section 10(a),[112] which means that under other provisions of TESRA, it is subject to "no surprises" protections[113] and not subject to further consultation under ESA Section 7.[114]

Finally, under TESRA, property owners may request written determinations from the Secretary to determine if a proposed use will comply with Section 9.[115] This is the same process that, as discussed

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[104] H.R. REP. NO. 109-237, at 46 (2005).
[105] H.R. REP. NO. 109-237, at 46 (2005).
[106] 50 C.F.R. § 17.22(c) & (d) (2004).
[107] H.R. REP. NO. 109-237, at 42 (2005).
[108] H.R. 3824, 109th Cong. § 10(1) (Sept. 29, 2005) (proposed ESA § 6(c)(3)).
[109] H.R. 3824, 109th Cong. § 10(1) (Sept. 29, 2005) (proposed ESA § 6(c)(3)).
[110] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 5(m)).
[111] *See* H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA §§ 5(m)(1), 5(m)(2)(B)(iv), 5(m)(3)(E)).
[112] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 5(m)(8)).
[113] H.R. 3824, 109th Cong. § 12(a)(3) (Sept. 29, 2005) (proposed ESA § 10(a)(4)).
[114] H.R. 3824, 109th Cong. § 11(a)(4) (Sept. 29, 2005) (proposed ESA § 7(a)(6)).
[115] H.R. 3824, 109th Cong. § 12(d) (Sept. 29, 2005) (proposed ESA § 10(k)).

in Part III.B above, provides the basis for seeking compensation under new ESA Section 13.[116]

G. Changes to Section 7 Consultation

TESRA makes several changes impacting Section 7 consultation under the ESA. First, because TESRA repeals critical habitat provisions, it changes the standard applicable to consultations under Section 7(a)(2). Under current law, federal agencies must consult with FWS to "insure" that a proposed action does not jeopardize the continued existence of a species or destroy or adversely modify designated critical habitat.[117] Under TESRA, however, federal agencies are only required to meet the "jeopardy" standard.[118] While FWS has long maintained that the distinction between the two standards is insignificant, recent case law has begun to recognize a difference. The theory under this trend is that avoiding jeopardy imposes only a "survival" standard, but prevention of adverse critical habitat modification requires consideration of the species' opportunity for "recovery" (through the inclusion of the word "conservation" in the definition of "critical habitat").[119] Elimination of critical habitat thus preempts any effort by the courts to use critical habitat to impose more onerous measures in a biological opinion.

Second, TESRA provides statutory authorization for the practice of "informal" consultations, which FWS has frequently employed via regulations first issued in 1986.[120] TESRA also authorizes FWS to implement other alternative consultation procedures, that is, "specific agency actions or categories of agency actions that may be determined to meet the standards of [ESA section 7(a)(2)]." However, the Committee Report states that "the same steps—consultation, biological opinion, Secretarial suggestion of or concurrence in a reasonable and prudent alternative—would have to occur" even under any alternative procedures that FWS may develop.[121]

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[116] H.R. 3824, 109th Cong. § 13 (Sept. 29, 2005) (proposed ESA § 13(d)(1)).

[117] 16 U.S.C. § 1536(a)(2) (2005).

[118] H.R. 3824, 109th Cong. § 9(c)(1) (Sept. 29, 2005) (proposed ESA § 7(a)(2)).

[119] *E.g.*, Gifford Pinchot Task Force v. FWS, 378 F.3d 1059, 1070 (10th Cir. 2004) (criticizing FWS' regulations defining "critical habitat" for "fail[ing] to provide protection of habitat . . . for species' recovery").

[120] H.R. 3824, 109th Cong. § 11(a)(2)(D) (Sept. 29, 2005) (proposed ESA § 7(a)(2)(B)). *See also* H.R. REP. NO. 109-237, at 44-45 (2005) (explaining the history of the relevant regulations).

[121] *See* H.R. REP. NO. 109-237, at 45 (2005).

Third, a new Section 7(a)(5) provides that the "jeopardy" analysis "shall consider only the effects of any agency action that are distinct from a baseline of all effects upon the relevant species that have occurred or are occurring prior to the action."[122] Committee Report language elaborates on the intent of this provision:

> The ESA section 7(a) analysis is to determine the incremental effects of a proposed Federal agency action. Federal actions such as the ongoing operation of existing facilities cannot be expected to compensate for past activities or events in many cases occurring long before the ESA was originally enacted. Thus, this section provides that a jeopardy finding under ESA section 7(a) as amended would have to be based only on the incremental effects of the proposed action and not on pre-existing conditions.[123]

One area where this provision could have a substantial effect is in proceedings before the Federal Energy Regulatory Commission ("FERC") regarding hydropower facilities that predate enactment of the ESA. For purposes of its own environmental reviews under NEPA and the Federal Power Act, FERC uses a baseline that accounts for the existence of the dam.[124] However, FERC has also deferred to the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration ("NOAA Fisheries") in the decision to employ a baseline reflecting pre-dam conditions for purposes of a biological opinion under ESA Section 7.[125] Such an interpretation would be precluded under this provision in TESRA.

TESRA includes several other changes to section 7 consultation worth noting. For example, TESRA includes a new ESA Section 7(a)(6) providing that consultation is not required for actions that implement or are consistent with a permit issued under ESA Section 10, or any HCP or other agreement associated with the

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[122] H.R. 3824, 109th Cong. § 11(a)(4) (Sept. 29, 2005) (proposed ESA § 7(a)(5)).

[123] H.R. Rep. No. 109-237, at 45 (2005).

[124] *E.g.,* Pub. Util. Dist. No. 1 of Chelan County, Wash., 107 FERC ¶ 61,280, at PP 60-61 (2004). FERC's position on this point has withstood judicial review. Am. Rivers v. FERC, 201 F.3d 1186, 1199 (9th Cir. 2000).

[125] Pacific Gas & Elec. Co., 107 FERC ¶ 61,232, at PP 19-23, *reh'g denied,* 108 FERC ¶ 61,266 (2004). Under current law, NOAA Fisheries administers the ESA for ocean-going and anadromous species. *See* 50 C.F.R. §§ 223.102, 224.101 (2004). H.R. 3824 would eliminate the authority of NOAA Fisheries under the ESA and consolidates ESA administration for all species under FWS, effective one year from the date of enactment. *See* H.R. 3824, 109th Cong. § 21 (Sept. 29, 2005).

permit.[126] Also, TESRA includes provisions expressly requiring FWS to consider comments from the action agency and the permit applicant and to cooperate with both the action agency and the permit applicant in the development of reasonable and prudent alternatives.[127] Finally, TESRA imposes limitations on the reasonable and prudent measures that FWS may impose in section 7 consultation. Under TESRA, the reasonable and prudent measures which FWS may impose in the incidental take statement must be "roughly proportional to the impact" of the take.[128] Further, where "various terms and conditions are available" to implement such measures, the terms and conditions must be "capable of successful implementation" and "consistent with the objectives of the Federal agency and the permit or license applicant … to the greatest extent possible."[129]

H. Economic & National Security Impact Analysis

TESRA repeals the ESA's provisions relating to critical habitat, removing the requirement that FWS conduct an economic and national security impact analysis at the time it designates critical habitat, which is generally supposed to be completed concurrently with the listing process.[130] However, in response to concerns raised by the Alabama delegation, the bill as passed by the House includes an impact analysis requirement at the time of listing. Specifically, TESRA requires FWS to prepare, concurrently with the listing decision, "an analysis of (i) the economic impact and benefit of that determination; (ii) the impact and benefit on national security of that determination; and (iii) any other relevant impact and benefit of that determination."[131]

A statement by Chairman Pombo explaining this requirement appeared in the *Congressional Record* on October 6, 2005. According to Chairman Pombo, the Resources Committee "expects the impact analyses under H.R. 3824 will be better and more useful than those prepared under current law," because TESRA "expand[s] the scope of the analysis to include all consequences of the listing (rather than those

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[126] H.R. 3824, 109th Cong. § 11(a)(4) (Sept. 29, 2005) (proposed ESA § 7(a)(6)).

[127] H.R. 3824, 109th Cong. § 11(b)(3)(B) (Sept. 29, 2005) (proposed ESA § 7(b)(3)(A)).

[128] H.R. 3824, 109th Cong. § 11(b)(5) (Sept. 29, 2005) (proposed ESA § 7(b)(5)(A)).

[129] H.R. 3824, 109th Cong. § 11(b)(5) (Sept. 29, 2005) (proposed ESA § 7(b)(5)(B)). As noted above, the "roughly proportional" language has the same meaning for reasonable and prudent measures as for a Section 10(a) permit. H.R. REP. NO. 109-237, at 46 (2005); *see supra* at 13 (noting that the "roughly proportional" requirement has the same meaning for reasonable and prudent measures as for incidental take permits).

[130] H.R. 3824, 109th Cong. § 5(a) (Sept. 29, 2005).

[131] H.R. 3824, 109th Cong. § 4(d) (Sept. 29, 2005) (proposed ESA § 4(a)(3), as redesignated by H.R. 3824 § 5(a)).

attributable to critical habitat designation)."[132] The analysis will provide "truly meaningful information concerning proposed listing decisions to all those affected, including individuals, corporations, property owners, state and local governments, the military services, and other Federal agencies."[133] Chairman Pombo also noted that "[i]t is expected that this opportunity for greater participation by all potentially affected parties at the front end of the listing process will provide additional assurance that [FWS] will adequately consider all relevant data associated with each proposal to list a species."[134]

I. Other Notable Provisions

H.R. 3824 also included a number of other important measures that should be noted. For example, H.R. 3824 provides a national security exemption, which authorizes the President, "after consultation with the appropriate federal agency," to "exempt any act or omission" from the ESA if "necessary for national security."[135] Similarly, the bill includes an emergency exemption, which authorizes the President to "suspend the application of any provision of this Act in any area for which a major disaster is declared."[136] Even as it authorizes these exemptions, H.R. 3824 repeals provisions for the ESA Committee, which may authorize ESA exemptions, but only pursuant to a cumbersome and seldom-used process.[137] Commentators have noted the ineffectiveness of this Committee, which is commonly known as the "God Squad."[138]

Controversy has also surrounded the FWS's practice of listing "distinct population segments" of particular species, instead of listing the entire species population.[139] TESRA provides that the Secretary

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[132] 151 CONG. REC. E2028 (daily ed. Oct. 6, 2005) (statement of Rep. Pombo).

[133] *Id.*

[134] *Id.*

[135] H.R. 3824, 109th Cong. § 12(e) (Sept. 29, 2005) (proposed ESA § 10(l)).

[136] H.R. 3824, 109th Cong. § 12(f) (Sept. 29, 2005) (proposed ESA § 10(m)).

[137] H.R. 3824, 109th Cong. § 11(d)(1) (Sept. 29, 2005).

[138] *See* Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 146-47 (2004) (stating the "'God Squad' provision has had little effect because it is infrequently invoked, and even on the handful of occasions on which the Endangered Species Committee has been convened, it has never granted a wholesale exemption from the ESA's protections on the basis of cost-benefit analysis").

[139] H.R. REP. NO. 109-237, at 37 (2005). The House Resources Committee Report on H.R. 3824 explains as follows: "[I]n practice the 'Services have concluded that potential populations qualify as a [DPS] over 80 percent of the time.' . . . The Secretaries need clear direction and authority to limit the number of "distinct populations" that are found and listed. The historic overuse of that authority is diverting limited resources from more important ESA goals, is trivializing the ESA by protecting less-significant units, and is needlessly increasing the conflicts between the ESA and desired human land uses." *Id.*

should use the authority to list a distinct population segment "only sparingly."[140]

TESRA includes provisions, not codified in the ESA itself, to govern how the ESA interacts with certain other laws. Of particular interest to land owners in Florida, H.R. 3824 provides that Section 7 consultation is "equivalent to a section 101 incidental take authorization required under the Marine Mammal Protection Act of 1972," which should help streamline the permit process applicable to dock construction in Florida.[141] In addition, H.R. 3824 provides that, for a limited time not to exceed five years, any action by a federal or state agency or any "other person" pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") is deemed to be in compliance with the consultation requirement, the take prohibition, and the protective regulations for threatened species.[142] According to report language, the intent of this measure is to allow additional time for federal and state agencies to comply with newly promulgated regulations governing ESA compliance for FIFRA-related activities.[143]

Finally, changes are also made to the annual cost analysis that FWS prepares under current law.[144] TESRA expands the cost analysis to include the costs of state and local governments[145] and requires states to provide information on ESA-related costs as a condition of receiving funds under ESA section 6 in the next fiscal year.[146] Local governments are also encouraged to provide the information voluntarily.[147] The intent of the amendment is "to provide as comprehensive a picture of ESA expenditures as possible so that the societal commitment to endangered and threatened species conservation can be more accurately tracked."[148]

J. Measures Considered but Rejected

Several proposed amendments to the ESA were considered but ultimately rejected. First, as introduced on September 19, 2005, H.R.

(quoting Kate Geoffrey & Thomas Doyle, *Listing Distinct Population Segments of Endangered Species: Has It Gone Too Far?*, NAT. RESOURCES & ENV'T at 82, 84 (Fall 2001)).

[140] H.R. 3824, 109th Cong. § 4(a)(2) (Sept. 29, 2005) (proposed ESA § 4(a)(2)).

[141] H.R. 3824, 109th Cong. § 25 (Sept. 29, 2005).

[142] H.R. 3824, 109th Cong. § 20 (Sept. 29, 2005).

[143] H.R. REP. NO. 109-237, at 55 (2005).

[144] ESA § 18, 16 U.S.C. § 1544.

[145] H.R. 3824, 109th Cong. § 15(a) (Sept. 29, 2005) (proposed ESA § 16, as redesignated by H.R. 3824 § 16(2)).

[146] H.R. 3824, 109th Cong. § 15(b) (Sept. 29, 2005) (proposed ESA § 6(d)(3)).

[147] H.R. 3824, 109th Cong. § 15(a) (Sept. 29, 2005) (proposed ESA § 16(c), as redesignated by H.R. 3824 § 16(2)).

[148] H.R. REP. NO. 109-237, at 53 (2005).

3824 would have added a new definition of "jeopardize the continued existence," which read as follows:

> The term "jeopardize the continued existence" means, with respect to an agency action (as that term is defined in section 7(a)(2)), that the action reasonably would be expected to significantly impede, directly or indirectly, the conservation in the long-term of the species in the wild.[149]

The full implications of this language are not entirely clear. Nevertheless, the inclusion of the word "conservation" raised concerns among regulated entities that the definition would have imposed a more strenuous standard for the approval of a proposed federal action during consultation under ESA Section 7. The ESA defines that term as "the use of all methods and procedures which are necessary to bring any [listed] species to the point at which the measures provided pursuant to [the ESA] are no longer necessary."[150]

The Committee Report indicates that the inclusion of the word "long-term" was intended to facilitate activities causing only a short-term effect. Committee Report language explained: "A short-term impediment to conservation, no matter how significant, that has no lasting long-term effects would not support a jeopardy finding under the definition."[151] At the same time, however, requiring FWS to consider long-term effects could effectively broaden the analysis. For example, to determine the long-term effects of a proposal, it may be necessary to identify the cumulative effects of other actions, in order to

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[149] H.R. 3824, 109th Cong. § 3(c) (Sept. 19, 2005). This definition did not appear in the June 17th discussion draft, but rather appeared initially in H.R. 3824 as introduced. Remarks on the House floor indicate the provision was added with the support of, and possibly at the behest of, Rep. Nick Rahall, the ranking Democrat on the House Resources Committee. *See* 151 CONG. REC. H8536 (daily ed. Sept. 29, 2005) (statement of Rep. Rahall) ("For example, the manager's amendment abandons the definition of jeopardizing a species we agreed upon in committee."); *id.* at H8562 (statement of Rep. Rahall) ("One of the points that we had reached agreement on was that there was to be a recovery-based standard of determining when Federal agency actions jeopardize the continued existence of a species. The manager's amendment drops this crucial provision."). Rep. George Miller cited the subsequent deletion of this measure as one of the primary bases of his criticism of the bill. *See* 151 CONG. REC. H8581 (daily ed. Sept. 29, 2005) (statement of Rep. Miller). Mr. Pombo stated that the manager's amendment removed the definition to respond to the Administration's concerns about fostering excessive litigation. *See* 151 CONG. REC. H8581 (daily ed. Sept. 29, 2005) (statement of Rep. Pombo). *See also supra* at 6-7 (noting this as among the concerns included in the Administration's statement of position). The applicable provision of the manager's amendment is that which deletes lines 3-11 of page 4. 151 CONG. REC. H8560 (daily ed. Sept. 29, 2005).

[150] 16 U.S.C. § 1532(3) (2005).

[151] H.R. REP. NO. 109-237, at 36 (2005).

determine the relation, if any, between the proposal and other activities that can reasonably be expected to occur over time.[152]

In addition, H.R. 3824 originally proposed, but ultimately did not include, a provision restricting FWS's ability to apply the protective regulations of the ESA to threatened species. Under ESA Section 4(d), the "take" prohibition does not apply to threatened species automatically, but rather only if FWS issues "protective regulations."[153] In practice, however, FWS extends the "take" prohibition to threatened species across the board. As introduced, H.R. 3824 would have required FWS to provide a detailed statement "of the reason or reasons for applying any particular prohibition to the threatened species."[154] Under H.R. 3824, FWS would have been permitted to apply a protective regulation to more than one threatened species "only if the specific threats to, and specific biological conditions and needs of, the species are identical, or sufficiently similar, to warrant the application of identical prohibitions."[155] In other words, FWS would have been required to justify protective regulations on a species-specific basis, rather than extending the "take" prohibition to threatened species across the board. The House Resources Committee voted to strike this provision.[156]

Any comprehensive analysis of H.R. 3824 should also reference the substitute amendment offered by Rep. George Miller (D-CA) and others, which was defeated on the House floor. The substitute amendment largely followed the structure and content of

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[152] A reference to the long-term may be especially problematic for operators of hydropower facilities entering relicensing proceedings. FERC typically issues hydropower licenses for terms measuring in the decades. It is a top priority of licensees to obtain as much certainty as possible regarding license requirements at the time FERC issues the license. Without certainty, the license applicant cannot determine whether operation of the project will be economically viable. Negotiations on "reopener" clauses, allowing FERC to impose new requirements should circumstances change, can be among the most contentious issues in a relicensing proceeding. The "long-term" language may be interpreted as authorizing or even requiring FWS to insist on reserving the right to reexamine environmental conditions and impose new license conditions decades in the future, or to impose overly restrictive conditions to account conservatively for whatever might happen over a long period of time.

[153] 16 U.S.C. § 1533(d).

[154] H.R. 3824, 109th Cong. § 8 (Sept. 19, 2005) (proposed ESA § 4(d)(2)).

[155] H.R. 3824, 109th Cong. § 8 (Sept. 19, 2005) (proposed ESA § 4(d)(3)).

[156] The Resources Committee approved an amendment offered by Rep. Mark Udall (D-CO) to strike this language by voice vote. *See* H.R. REP. NO. 109-237, at 26 (2005). The Committee Report explained this action as follows: "An amendment striking [this section] was adopted when members of the Committee pointed out that the problem that section addressed was created by a single [FWS] rule which could be remedied by rulemaking without statutory change. The amendment . . . was agreed to on that basis. The Committee expects and directs the Secretary of the Interior to conduct promptly a rulemaking to reconsider and eliminate or restructure the [FWS] rule . . . in light of this report and legislative history." H.R. REP. NO. 109-237, at 24 (2005) (citation omitted).

H.R. 3824, but it differed as to the details in many notable respects. Like TESRA, the substitute amendment would have repealed critical habitat provisions of the present ESA.[157] However, the substitute amendment would have required a more detailed identification of habitat in the recovery plan. Under this amendment, the recovery plan would have been required to include an "identification of those publicly owned areas of land or water that are necessary to achieve the purpose of the recovery plan . . . and, if such species is unlikely to be conserved on such areas, such other areas as are necessary to achieve the purpose of the recovery plan."[158] Moreover, FWS would have been required to consider the effects of a proposed federal action on these areas during a consultation under ESA Section 7(a)(2).[159]

With respect to other issues, the substitute amendment would have: included the above-noted definition of "jeopardize the continued existence";[160] deleted the mandate to designate a distinct population segment "sparingly";[161] deleted the measure providing that "[n]othing in a recovery plan shall be construed to establish regulatory requirements";[162] deleted a provision for state-specific downlisting and delisting criteria;[163] deleted the provision for state-sponsored candidate conservation programs;[164] deleted provisions for alternative consultation procedures and new "baseline" provisions applicable in consultations;[165] restored the "God Squad" provisions;[166] and deleted the compensation section and replaced it with a "Private Property Conservation Program" more akin to the recovery implementation

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[157] Am. No. 2 to H.R. 3824, § 5 *reprinted at* 151 CONG. REC. H8564-65, (daily ed. Sept. 29, 2005).

[158] Am. No. 2 to H.R. 3824, § 10(a)(3) (proposed ESA § 5(c)(1)(A)(iv)), *reprinted at* 151 CONG. REC. H8564, 8566 (daily ed. Sept. 29, 2005).

[159] Am. No. 2 to H.R. 3824, §§ 5, 10(a)(3) (proposed ESA § 5(c)(2)), *reprinted at* 151 CONG. REC. H8564, 8566 (daily ed. Sept. 29, 2005).

[160] Am. No. 2 to H.R. 3824, § 3(c), *reprinted at* 151 CONG. REC. H8564 (daily ed. Sept. 29, 2005).

[161] *Compare* H.R. 3824, § 4(a) (Sept. 29, 2005) (proposed ESA § 4(a)(2)) *with* Am. No. 2 to H.R. 3824, § 4(a), *reprinted at* 151 CONG. REC. H8564 (daily ed. Sept. 29, 2005).

[162] *Compare* H.R. 3824, § 9(a) (Sept. 29, 2005) (proposed ESA § 5(i)(1)(B)) *with* Am. No. 2 to H.R. 3824, § 10(a) (proposed ESA § 5(i)(1)), *reprinted at* 151 CONG. REC. H8564, H8567 (daily ed. Sept. 29, 2005).

[163] *Compare* H.R. 3824, § 9(b) (Sept. 29, 2005) (proposed ESA § 5(j)) *with* Am. No. 2 to H.R. 3824, § 10 (proposed ESA § 5), *reprinted at* 151 CONG. REC. H8564, H8566-67 (daily ed. Sept. 29, 2005).

[164] *Compare* H.R. 3824, § 10(1) (Sept. 29, 2005) (proposed ESA § 6(c)(3)(A)) *with* Am. No. 2 to H.R. 3824, § 11(1) (proposed ESA § 6(c)(3)(A)), *reprinted at* 151 CONG. REC. H8564, H8567 (daily ed. Sept. 29, 2005).

[165] *Compare* H.R. 3824, §§ 11(a)(2)(D), 11(a)(4) (Sept. 29, 2005) *with* Am. No. 2 to H.R. 3824, § 12(d), *reprinted at* 151 CONG. REC. H8564, H8568 (daily ed. Sept. 29, 2005).

[166] *Compare* H.R. 3824, § 11(d) (Sept. 29, 2005) *with* Am. No. 2 to H.R. 3824, § 12(d), *reprinted at* 151 CONG. REC. H8564, H8567 (daily ed. Sept. 29, 2005).

agreements of H.R. 3824, with payments limited to a 70 percent cost-share, and subject to the availability of appropriations.[167]

In advocating on behalf of the substitute amendment, some of the proponents professed to agree that there are problems with the ESA, and they stressed the similarity of the substitute to the legislation introduced by Chairman Pombo. In the words of Rep. John Dingell (D-MI), one of the cosponsors of the substitute amendment, "I would note that there are few real differences between the substitute . . . and the legislation as it is before us."[168] Even with respect to the issue of compensation, which has been contentious in the past, some proponents of the substitute offered differences not in principle, but rather in program design and implementation. For example, Rep. Peter DeFazio (D-OR) stated that he had intended to "offer an amendment to say that we would compensate people for foregoing the usual historic and accustomed use."[169] His objection was that the compensation mechanism, in his view, would have allowed for enormous payments based on claims of speculative foregone development.[170] Chairman Pombo noted, appropriately:

> [W]e have come a long ways, because, as you know, I have been working on [ESA reform] since I got here, and when I first started, all I heard was there is nothing wrong with the [ESA] that a little bit more money would not solve. Here we are today, everybody saying that there is problems [sic] with the law and we have to fix it. So we have come a long ways, and I am being attacked for spending more money under the act on the reauthorization.[171]

IV. PROSPECTS FOR SENATE CONSIDERATION AND ENACTMENT

In the Senate, the Environment and Public Works ("EPW") Committee has jurisdiction over the ESA. In response to passage of H.R. 3824, Sen. James Inhofe (R-OK), who chairs the EPW

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[167] *Compare* H.R. 3824, § 13 (Sept. 29, 2005) *with* Am. No. 2 to H.R. 3824, § 14 *reprinted at* 151 CONG. REC. H8564, H8567 (daily ed. Sept. 29, 2005).

[168] 151 CONG. REC. H8540 (daily ed. Sept. 29, 2005) (statement of Rep. Dingell).

[169] 151 CONG. REC. H8520 (daily ed. Sept. 29, 2005) (statement of Rep. DeFazio).

[170] *Id.* at H8521. This claim is contrary to the cost estimate by CBO, which found that "it would be difficult for landowners to receive aid for larger claims above $1 million under the section 13 process because most larger land-use projects would be ineligible to receive written determinations under section 12." H.R. REP. NO. 109-237, at 61 (2005). The CBO cost estimate is discussed further *supra* at note 70.

[171] 151 CONG. REC. H8581 (daily ed. Sept. 29, 2005) (statement of Rep. Pombo).

Committee, issued a press release stating: "I applaud the efforts of House Resources Chairman Richard Pombo for working so diligently to pass a bipartisan ESA bill."[172] That statement also said, "I look forward . . . to working with my Senate colleagues on producing ESA legislation *this year*."[173] Since that time, Sen. Inhofe has cited a critical habitat designation for the Arkansas River shiner as an additional indication of the need for legislative reform.[174]

Other key senators have also offered public support for an ESA reform bill. Most notably, Sen. Mike Crapo (R-ID), past chairman of the jurisdictional subcommittee of the EPW Committee, stated on October 6, 2005, that he would like to introduce legislation as soon as "this month."[175] Sen. Crapo and Sen. Blanche Lambert Lincoln (D-AR) are leading a mostly Republican, mostly Western group of eight senators who intend to draft ESA legislation, focusing especially on private land owner incentives, increasing the role of the states, improving the quality of science in listing decisions, and increasing the emphasis on recovery.[176] Senators Crapo and Lincoln are the Chair and ranking Democrat, respectively, of the Subcommittee on Forestry, Conservation and Rural Revitalization of the Senate Committee on Agriculture, Nutrition and Forestry. Through that subcommittee, Senators Crapo and Lincoln held hearings during the summer on species conservation measures in the Farm Bill and on oversight of the conservation reserve program.[177] Regarding their efforts, Sen. Lincoln said in July, "I am looking forward to working with Sen. Crapo in the next couple of months, we are going to focus on ESA and conservation programs and put together something thoughtfully."[178] Senators

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[172] Press Release, U.S. Sen. Comm. on Envt. & Pub. Works, Inhofe Applauds House Approval of Endangered Species Legislation (Sept. 29, 2005), *available at* http://epw.senate.gov/pressitem.cfm?party+rep&id= 246665.

[173] *Id.* (emphasis added).

[174] Press Release, U.S. Sen. Comm. on Envt. & Pub. Works, Inhofe Disappointed with Critical Habitat Designation (Sept. 29, 2005), *available at* http://epw.senate.gov/pressitem.cfm?party+rep&id=247259.

[175] Endangered Species: Sen. Mike Crapo (R-Idaho) Talks About His Plans for Endangered Species Legislation, Transcript of interview on E&E TV (Oct. 6, 2005), *available at* http://www.eande.tv/transcripts/?date= 100605#transcript.

[176] Press Release, U.S. Senator Mike Crapo (Aug. 8, 2005), Crapo, Lincoln to Chair Bipartisan Working Group to Write ESA Bill, *available at* http://crapo.senate.gov/media/newsreleases/release_full.cfm?id= 243683&& (last visited Oct. 17, 2005); Press Release, U.S. Senator Mike Enzi (Aug. 16, 2005), Enzi Aim to Reform Endangered Species Act, *available at* http://enzi.senate.gov/esa3.htm. Sen. Enzi's press release also states that the group seeks to increase ESA funding while increasing accountability for program funds. The other six senators in this group, all Republicans, are Sens. Thomas (WY), Enzi (WY), Bennett (UT), Burns (MT), Allard (CO), and Craig (ID). Benton Ives-Halperin, Republicans in Both Chambers Preparing to Tackle Endangered Species Act, CQ Today (Aug. 17, 2005).

[177] Those hearings took place on July 26 and 27, 2005.

[178] Allison A. Freeman, *Sens. Crapo, Lincoln Drafting Landowner Incentives Bill,* ENVT. & ENERGY DAILY (July 27, 2005).

Crapo and Lincoln announced the introduction of S. 2110, the Collaboration for the Recovery of the Endangered Species Act ("CRESA"), on December 15, 2005. This bill provides tax breaks and other incentives for private conservation measures.

A variety of other senators have offered public statements indicating either an interest in legislative reform, or concern about the implementation of the ESA in their state, or both. On the Senate floor this past spring, Senator Craig Thomas (R-WY) gave a speech in which he specifically cited ESA reform as a priority.[179] Sen. Mike Enzi (R-WY) recently stated, "[i]t is well past time to modernize the Endangered Species Act."[180] Sen. David Vitter (R-LA) was quoted as saying at a public hearing, "Clearly the time has come to strengthen and improve the act and do a better job of proactively recovering species."[181] A representative of Sen. Conrad Burns (R-MT) has stated publicly that the senator supports TESRA and looks forward to working with Sen. Crapo on ESA legislation.[182] Senators Bennett (R-UT), Domenici (R-NM), and Bingaman (D-NM) have also sponsored or cosponsored legislation addressing localized ESA issues, indicating an awareness of difficulties with ESA implementation in their states.[183]

Tempering these indications of support for ESA reform, however, is the leadership of the EPW Subcommittee on Fisheries, Wildlife and Water ("FWW"). Sen. Lincoln Chafee (R-RI), who chairs the subcommittee, has stated that he does not intend to pursue ESA legislation quickly. To the contrary, before H.R. 3824 was introduced, Sen. Chafee said, "[i]f an unacceptable, partisan bill passes in the House, I think that will make activity slow down here."[184] Likewise, the minority leadership on the FWW subcommittee and full EPW committee also show every sign of resisting meaningful ESA reform legislation. At a subcommittee hearing on May 19, 2005, Sen. James Jeffords (I-VT), ranking member of the EPW committee, stated

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[179] 151 CONG. REC. S3353, S3354 (daily ed. Apr. 7, 2005) (statement of Sen. Thomas).

[180] Press Release, U.S. Senator Mike Enzi (Aug. 16, 2005), *available at* http://enzi.senate.gov/esa3.htm.

[181] Allison A. Freeman, *Chafee Keen on Landowner Incentives but Not on House ESA Bill,* ENVT. & ENERGY DAILY (July 14, 2005).

[182] Scott McMillion, *ESA Close to Reform,* BOZEMAN DAILY CHRONICLE (Oct. 23, 2005), *available at* http://www.bozemandailychronicle.com/articles/2005/10/23/news/01esareform.txt.

[183] 151 CONG. REC. S492 (daily ed. Jan. 25, 2005) (statement of Sen. Bennett upon introducing S. 164); 151 CONG. REC. S9299 (daily ed. July 28, 2005) (statement of Sen. Domenici upon introducing S. 1540, a bill for which Sen. Bingaman served as an original cosponsor).

[184] Allison A. Freeman, *Chafee Keen on Landowner Incentives but Not on House ESA Bill,* ENVT. & ENERGY DAILY (July 14, 2005).

that the ESA is basically working well, and the hearing merely served a function of routine oversight.[185] At the same hearing, Sen. Hillary Clinton (D-NY), who serves as the ranking Democrat on the FWW subcommittee, emphasized the benefits of species conservation, although she also expressed some sympathy for the concepts of incentives for land owners and enhancing state involvement.[186]

V. CONCLUSION

H.R. 3824 offers much for private land owners in the South to look forward to. They will certainly welcome the shift from a focus on critical habitat designation to species recovery. H.R. 3824 includes extensive, process-oriented recovery planning provisions. These measures provide previously unavailable opportunities for regulated interests to participate on the recovery team to develop guidelines to govern the measures that may subsequently be required in a Section 7 consultation or a Section 10 permit (though it may prove expensive to develop or hire the expertise necessary to take full advantage of these provisions). They also require consideration of the cost of recovery measures to an unprecedented extent. The compensation provisions in

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[185] *Oversight on the Endangered Species Act, Before the Subcomm. on Fisheries, Wildlife and Water of the House. Comm. on Environment & Public Works,* 151st Cong. (May 19, 2005) (statement of Sen. James Jeffords), *available at* http://epw.senate.gov/hearing_statements.cfm?id=237935 ("So, if the Act is achieving its goals, why are we here today? We are here because we are responsible for overseeing the programs that this Subcommittee has jurisdiction over, and to hear from the witnesses on the status of these programs and recommendations to improve them.").

[186] *Oversight on the Endangered Species Act, Before the Subcomm. on Fisheries, Wildlife and Water of the House Comm. on Environment & Public* Works, 151st Cong. (May 19, 2005) (statement of Sen. Hillary Rodham Clinton), *available at* http://epw.senate.gov/hearing_statements.cfm?id=237952. Senators Chafee and Clinton have stated they prefer to await the results of a so-called "Keystone process" before pursuing legislative activity. *See* Allison A. Freeman, *Lawmakers Consider Tweaks to ESA Overhaul Proposal,* GREENWIRE (Sept. 22, 2005). This refers to a process initiated in response to a letter from Senators Chafee, Inhofe, Crapo, Clinton, Jeffords, and Lincoln, to the Keystone Center in Keystone, Colorado. The Keystone Center has assembled an "ESA Working Group" to consider the current law on critical habitat and to attempt to identify methods "to better conserve habitat and help species recover." *See* The Keystone Center, ESA Working Group (Sept. 28, 2005), *available at* http://www.keystone.org/ html/esa_working_group.html. The Keystone group comprises two dozen individuals representing environmentalists, businesses, states, and academia. The Keystone Center has planned two meetings, one each in November and December of 2005, which will be closed to those who are not members of the group. If the Keystone Center identifies ideas, "which is by no means guaranteed," then it will make a written product publicly available after it is provided to the Senators. It is impossible to predict exactly when or what that would be, but the nature of the process indicates that completion prior to next January or February of 2006 is optimistic.

Senator Crapo has stated that while the Keystone process is "an excellent way to approach the issue," he does not believe that senators must wait on the outcome of that process. Endangered Species: Sen. Mike Crapo (R-Idaho) Talks About His Plans for Endangered Species Legislation, Transcript of interview on E&E TV (Oct. 6, 2005), *available at* http://www.eande.tv/transcripts/?date=100605#transcript.

H.R. 3824 are extraordinary in providing funds, not subject to annual appropriations, for lost value (including business losses) associated with compliance with the "take" prohibition for otherwise lawful activities. Also, H.R. 3824 offers various opportunities for improvements in the use of science during the listing process.

H.R. 3824 includes numerous opportunities for participation by the public and regulated entities, in addition to those provided through the recovery planning process. The impact analysis required at the time of listing should provide better information to the public about the potential impacts of a listing, particularly for the benefit of those most likely to be affected. Measures to enhance applicant participation may enhance agency responsiveness in a Section 7 consultation. On the other hand, the recovery planning process does not include substantial public notice or other public participation until the issuance of a draft recovery plan, and H.R. 3824 exempts the recovery team from the Federal Advisory Committee Act.

Finally, H.R. 3824 provides greater state authority to implement species conservation programs than current law by authorizing conservation agreements under which the state may implement candidate conservation programs that remain effective even if a species is listed. Given bipartisan support for the notion of providing greater regulatory authority to the states,[187] it seems possible that Congress could consider delegating other ESA-related functions to the states, following the model of pollution control statutes such as the Clean Water Act and the Clean Air Act.

Compared to the House, the Senate is likely to proceed more slowly. Given the recent public statements of various senators, there appear to be three avenues where meaningful ESA reform legislation may emerge: the FWW subcommittee, the Crapo-Lincoln efforts, or the EPW committee. The FWW subcommittee is not expected to move quickly on draft legislation, and as of the completion of this article for publication, there has been no outward indication that either the chairman or the ranking member is actively drafting legislation comparable in scope to H.R. 3824. However, Senators Crapo and Lincoln have indicated they may be relatively farther along in the development of draft legislative language. Finally, given his public pronouncements, Sen. Inhofe could conceivably take up H.R. 3824 and use it as the vehicle for full EPW committee action, should he grow impatient with the subcommittee's lack of commitment to action (although we are aware of no indication from Sen. Inhofe's office or

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[187] *See supra* note 187 (noting the support of Sen. Clinton, ranking Democrat on the FWW Subcommittee, for this concept).

the full committee that there is any intention of doing so at the present time).

While much work is left to be done, H.R. 3824 promises to enlist the active support of those who control most of the land in the South where threatened and endangered species live. With its move toward a recovery-focused ESA, this legislation offers a refreshing and remarkable contrast from the current statutory framework of confrontation and prohibition, by which most species have, at best, merely hung onto survival. When landowners and regulated entities are provided the opportunity to actually participate in shaping the conservation program, and when they are rewarded rather than punished for their efforts, the real winners may well prove to be the threatened and endangered species themselves.