

CHANGES TO THE ENDANGERED SPECIES ACT INCLUDED IN S. 2110, SENATOR MIKE CRAPO'S COLLABORATION AND RECOVERY OF ENDANGERED SPECIES ACT

The Collaboration and Recovery of Endangered Species Act (CRESA) introduced on December 15, 2005 by Senator Mike Crapo (R-ID) makes a number of changes to the ESA that will undermine the Act's existing protections for imperiled species. While it does not change the definition of acceptable science nor does it expressly eliminate critical habitat as in Rep. Richard Pombo's Threatened and Endangered Species Recovery Act (TESRA) CRESA's overall effect is the same: substantially less protection for species. The major changes to the ESA included in CRESA are:

1. *Delays Secretarial decisions to protect species and requires that a priority system be established for such decisions.* Currently, the ESA requires the Secretary (of Interior or Commerce) to respond to petitions to list species and designate critical habitat within one year. CRESA extends the deadlines for listing to 3 years and extends critical habitat designation to 3 years after a recovery plan is issued or 5 years after listing. There is a loophole here, however in that there is no deadline for issuing recovery plans. Thus an imperiled species may not be listed for up to three years and may not get critical habitat designated for 8 years – or ever. CRESA also requires the Secretary to establish a priority system for making listing and critical habitat decisions that considers the level of risk to a species, likelihood of achieving recovery and other factors. That priority system cannot be altered by court order and all existing court ordered deadlines must meet the priority schedule.

2. *Creates a number of situations where developers can engage in unlimited incidental takes or destroy critical habitat.* The ESA's habitat protections are one of the main reasons why the Act has been successful in preventing extinctions and putting species on the road to recovery. Through its protections against jeopardy and adverse modification of critical habitat and its limits on incidental take, the ESA requires commitments to minimize and mitigate the harmful effects of economic activity in endangered species habitat. CRESA waives these protections in several ways. First, and perhaps most significant, CRESA requires the Secretary to issue a "provisional" permit authorizing a developer to engage in unlimited incidental take, without any effort to minimize or mitigate the harm to species, whenever there is no recovery plan in place for the species and the permit applicant has "initiated" (but not completed) a field survey to determine the area occupied by the species. The only activity not allowed is ground clearing. The provisional permit remains in place until a habitat conservation plan or recovery plan is approved – meaning that harmful activities can go forward for years. Second, CRESA requires the Secretary to issue a permit authorizing a landowner to engaged in unlimited incidental take whenever the landowner has committed to undertake one or more "recovery actions" in an approved recovery plan, yet does not require that the recovery actions provide meaningful benefits to listed species. The damage caused by the authorized habitat destruction can exceed the benefits of the recovery actions, so long as those benefits are not "intentionally" reversed or impaired. Third, CRESA allows unlimited incidental take by landowners and others pursuant to cooperative agreements

between the Secretary and one or more states. Although the Secretary must undertake a programmatic review of the cooperative agreement to consider whether it is an “adequate and active” conservation program, the bill does not require that the Secretary consider the effects of particular habitat-disturbing actions or that it ensure that landowners and others minimize or mitigate the harmful effects of those actions. Fourth, CRESA establishes a complicated new “conservation banking” program under which developers can buy and sell conservation bank “credits” which are units of currency generated by preserving or restoring habitat. These conservation banks are to be managed to balance the biological condition of species and their habitat with “economic free market principals to ensure value to landowners through a tradable credit program.” It is unclear whether and the extent to which this system will ensure species and habitat protection. Finally, CRESA codifies the “no surprises” policy for habitat conservation plans. Thus, when circumstances changes, the Secretary can require changes to the harmful land activity in order to protect species.

3. Allows developers to adversely affect one or more listed species while ostensibly protecting another. CRESA waives ESA § 7 (consultation) and NEPA protections for any incidental take permit that implements a recovery action from an approved recovery plan and whose contribution to recovery is proportional to authorized take. Under current law an ESA § 7 review of an incidental take permit is carried out in part to ensure that endangered species not covered by the permit are not jeopardized. CRESA creates a loophole that poses a risk to listed species not covered by a particular incidental take permit. In addition, under the conservation bank system that allows credits to be bought and sold, a developer can mitigate for the loss of habitat for one species by acquiring credits that conserve habitat for a completely different species (“out-of-kind” mitigation). This would allow for uncompensated loss of habitat for some listed species.

4. Recovery plans would become meaningless since there is no deadline for their preparation and approval, and development of the plans would be dominated by industry. CRESA includes no deadlines for the preparation and approval of recovery plans and preparation is subject to the priority ranking system for all species protection decisions. In addition, all recovery plans are explicitly “non-binding and advisory.” Moreover, while recovery plans will be written by a “recovery team” consisting of experts, the plan is then submitted to an “executive committee,” a stakeholder group which will be dominated by industry and local interests, which can amend the plan before submitting it to the Secretary for approval. If the Secretary approves the plan, the executive committee oversees implementation of the plan by developing annual work plans.

5. Requires taxpayers to pay for compliance with the law. CRESA creates new tax deductions and credits to allow landowners to recover all costs of actions to conserve endangered species – even those required by permits or otherwise required by law. While tax incentives are a good idea, they should be limited to affirmative conservation measures above and beyond applicable law, not for measures to mitigate harm to public resources as required by law. CRESA also requires the Secretary to reimburse a developer for the costs of preparing a NEPA document in order to obtain an incidental take permit.

Title I – State Government Assistance in Recovery Act.

This title is nearly identical to a section of HR 3824, Rep. Pombo's bill to amend the ESA. The only difference is that Rep. Pombo's bill includes language to addressing cooperation with Indian tribes as well as states in listing decisions and the protection of listed species.

Title II – Priority for Listing and Recovery.

This title extends the deadline for listing decisions from one to three years and establishes a priority schedule for decisions regarding listing, status review, designation of critical habitat and the commissioning of recovery programs.

- Extends deadline for listing decisions from 12 months to 3 years and requires that the decision shall follow the priority schedule. (pg. 10, ln. 19)
- Extends deadlines to respond to petitions to revise critical habitat designations. Deadline for finding whether petition presents substantial scientific information is extended from 90 days to 1 year (pg. 12, ln. 6) and deadline for determining how to proceed is extended from 12 months to 3 years (pg 12, ln. 12). These decisions must also comply with priority schedule.
- Requires that regulations to designate or revise critical habitat include maps and coordinates describing in detail the specific areas that are designated and the data used to make the determination. This information must be maintained on a DOI website. (pg. 13, ln. 17)
- Critical habitat designation is extended to 3 years after the date on which a recovery plan is issued or 5 years after a species is listed. (pg. 14, ln. 15)
- Requires the Secretary to establish provisional recovery goals for a species at the time of the listing which may set standards for delisting and will remain in effect unless replaced by a recovery plan. (pg. 15, ln. 3)
- Requires Secretaries of Interior and Commerce to, within 270 days after enactment, establish a priority system for making all decisions regarding listing and critical habitat. The secretaries must first provide public notice and comment. (pg. 16, ln. 3)
- Establishes criteria to be used in establishing priority system – magnitude of immediacy of extinction, level of risk to species, likelihood of recovery, etc. (pg. 16, ln. 14)
- Secretary shall assign the highest priority to the pending action of any species if petitioned to do so by a “collaborative group” that meets the description of an “executive committee” that the Secretary can establish to oversee recovery. (pg 18, ln. 14) In other words, a group that includes a diversity of interests affected by the species' listing, and a diversity of expertise on the species.

- Secretary shall report annually to the appropriations committees the quantity of petitions received, status reviews to be completed, rules to be promulgated and funds required for recovery plans. (pg. 19, ln11)
- Recovery programs are initiated by the Secretary assigning a recovery coordinator (pg. 22, ln. 1) and the Secretary may also form a recovery team, executive committee or both, based on extent of recovery actions. (pg. 22, ln. 5)
- Recovery teams consist of members of public and private agencies and institutions with professional, expertise and technical and academic experience relating to the species or ecosystem. (pg. 22, ln. 8) The recovery team shall propose a recovery plan to the executive committee. (pg. 23, ln. 1)
- Secretary also establishes executive committee to achieve goals of recovery plan. Membership of committee shall include cross-section of interests from public and private individuals, agencies or institutions reflecting a balance of viewpoints. Members shall have knowledge and experience in natural resource issues and be committed to collaborative decision making, and shall have an economic, social or professional interest in the recovery of the species. To the extent possible members shall be from geographic area of the recovery plan. (pg. 23, ln. 17)
- The executive committee shall review the proposed recovery plan from the recovery team and shall recommend it, with any amendments to the Secretary for approval. The committee shall also work with state, local and tribal governments on implementing recovery plan and shall publish annual work plans.
- Each recovery program shall have a full-time recovery coordinator to oversee recovery plan implementation and manage operations of the executive committee.
- Recovery plans are non-binding and advisory. (pg. 26, ln. 21)
- Secretary shall coordinate with other governmental agencies and incorporate existing conservation programs into recovery plan. (pg 27, ln. 5)
- Secretary shall periodically review progress of recovery programs. If progress toward species recovery is not occurring Secretary shall submit to relevant executive committee a written inquiry for an explanation that requests specific remedial action. The committee has 180 days to fulfill the request. (pg. 27, ln. 11)
- If the executive committee disputes the Secretary's finding of a lack of progress, the Secretary and committee shall each "in consultation with a professional society" appoint a technical reviewer and those reviewers shall appoint a third reviewer. The reviewers shall make a recommendation to the Secretary as to whether progress toward species recovery is being made and whether remedial actions are necessary. (pg. 28, ln. 1) The Secretary shall take action based on that recommendation.

Title III – Incentives for Species Recovery

Conservation Banks

- Authorizes the establishment of “conservation banks” – habitat that is managed for the conservation and recovery of threatened or endangered species or a species of special concern. (pg. 30, ln 21)
- Defines “credit” of a conservation bank to mean the unit of currency generated by preserving or restoring habitat in a conservation bank agreement, as established through a quantification of the conservation values of a species or habitat. (pg. 31, ln. 11) The conservation values shall be determined by the Secretary for each conservation bank and shall be converted to a fixed number of credits that may be bought, sold, or traded to offset the impact of state, tribal, local or private activities. (pg. 31, ln. 17)
- A conservation bank may be established by the Secretary or any person who submits an application to the Secretary if a particular parcel of land is “managed under enforceable legal instruments” and is consistent with one or more recovery plans or the management of candidate species. (pg. 32, ln. 16)
- The Secretary shall approve or disapprove a proposed conservation bank not later than 180 days after receiving an application. (pg. 33, ln. 19)
- A conservation bank may be managed in accordance with a conservation bank agreement by either the Secretary, a state, the holder of the conservation bank, another party. (pg. 33, ln 1) The conservation bank agreement is prepared by the holder of the conservation bank and then submitted to the Secretary for approval.
- Conservation banks are to be an integral part of recovery plans and incentive programs. (pg. 36, ln. 10) The Secretary shall promulgate regulations to manage conservation banks in a manner that balances the biological condition of listed species or species of concern and their habitat with “economic free market principles to ensure value to landowners through a tradable credit program.” (pg. 36, ln, 14)
- Conservation banks are allocated a certain number of credits that can be transferred. The number is determined by biological value of the land in the conservation bank to listed species or species of concern. (pg 38, ln. 11)
- Credits in conservation banks can be transferred in order to comply with a court injunction, a requirement under the incidental take or jeopardy sections of the ESA, or out-of-kind mitigation. (pg. 39, ln. 1)
- Out-of-kind mitigation is defined to mean mitigation involving different species or habitats (pg. 39, ln. 18), and may be authorized by the Secretary through the use of

conservation bank credits. (pg. 38, ln. 23) In-kind mitigation shall be given preference to the extent practicable however. (pg. 40, ln. 8)

- A holder of a conservation bank may retain any profits from the transfer of a credit. (pg 41, ln. 15)
- To the extent practicable, conservation banks shall be integrated with conservation plans developed under section 10 if the conservation bank meets the ecological criteria of the habitat conservation plan and provides greater economic benefit compared with other forms of mitigation. (pg. 41, ln.21)

Incidental Takes

- The application process for an incidental take permit is amended to add the following additional requirements for a habitat conservation plan: a summary of the potential for incidental takes; funding available to implement mitigation; the measurable biological goals of the HCP; the monitoring of the HCP; adaptive management measures. (pg. 44, ln. 8)
- If the Secretary finds that a proposed HCP will implement one or more site-specific recovery actions from an approved recovery plan so that the contribution to recovery is at least proportional to the incidental take, the plan shall be exempt from section 7 (interagency consultation) and NEPA. (pg. 47, ln. 1)
- Provisional permits shall be issued if no recovery plan has been approved as of the date the incidental take application is submitted and the applicant has initiated a field survey to determine the area occupied by the species. The provisional permit shall allow any activity except ground clearing and shall remain in effect until an incidental permit is issued or a recovery plan is approved. (pg. 48, ln. 1)
- If the holder of an incidental take permit is in compliance with the permit the Secretary shall not require any additional mitigation, minimization or other measures during the term of the permit. (pg. 50, ln. 5) When change of circumstances not foreseen in the permit occurs, the Secretary can require additional mitigation or other measures only if they do not involve the commitment of additional land, water or financial resources or the imposition of any additional restrictions on the land. (pg. 51, ln. 4)
- Any NEPA document prepared for an incidental take permit shall analyze only the mitigation and minimization measures proposed by the applicant and the no-action alternative. (pg. 53, ln. 13) In addition, the Secretary shall, if funds are available, reimburse a permit applicant for costs incurred in preparation of a NEPA document. (pg. 54, ln. 3)

Tax Incentives

- The Internal Revenue Code is amended to allow an individual or corporation to claim a tax deduction for the cost of any credit purchased from a conservation bank. (pg. 56, ln. 4)
- A tax credit is allowed in an amount equal to the qualified conservation and recovery costs incurred by a taxpayer. (pg. 57, ln. 7) Costs can be those incurred in carrying out recovery actions under either the ESA or any other federal or state approved conservation and recovery agreement. (pg. 57, ln. 21)
- Tax credits will be either 100% or 75% of actual costs depending on whether a conservation agreement is for 99 or more years or for 30 or more years. (pg. 58, ln. 6)

Title IV – Protections and Measures in Forests

- Adds language to the Healthy Forests Restoration Act of 2003 that allows landowners who enroll their land in the reserve program and implement a site specific recovery action included in an approved recovery plan to receive incidental take protection during the duration of the agreement and within the area in which the net conservation benefits will accrue. (pg. 63, ln.1)
- If a landowner is engaged in conservation activities that are not site-specific recovery actions from an approved recovery plan, the Forest Service shall make available to the landowner safe harbor or similar assurances and protections under section 7(b)(4) of the ESA. (pg. 63, ln. 17)